Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

T. MICHAEL MACARIO, III,
Petitioner

v.

PRATT & WHITNEY CANADA, INC., et al.,
Respondents

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, contrary to the decisions of this Court, a court in granting summary judgment may make factual determinations contrary to the uncontradicted affidavits and concrete evidence proffered by the non-moving party?

2. Whether action by a federal agency serves to relieve a contracting party from state law liability for breach of contract where that federal agency's action does not prohibit contract compliance?

3. Whether a court may enter summary judgment and conclude as a matter of law that the *Noerr-Pennington* doctrine applies to a defendant's conduct in a non-antitrust case where the non-moving party has presented uncontradicted affidavits and other concrete evidence showing that the application to the federal agency was a sham?

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Third Circuit: T. Michael Macario, III, Pratt & Whitney Canada, Inc., and Beech Aircraft Corporation.

T. Michael Macario, III is an individual, a citizen and resident of the Commonwealth of Pennsylvania, and is the administrator of the estate of Matthew Macario, deceased, who was a Pennsylvania resident at the time of his death. Pratt & Whitney Canada, Inc. is a Canadian corporation, and is a subsidiary of United Technologies Corporation. Beech Aircraft Corporation is a Delaware corporation with its principal place of business in Kansas, and is a subsidiary of Raytheon Company.

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OPINIONS BELOW

The final order of the United States Court of Appeals for the Third Circuit, on petition for rehearing (per Robert E. Cowan, J.), appears in the appendix to this petition (App. A-1), as well as the memorandum opinion of the court of appeals (per Robert E. Cowan, J.) (App. A-2 to A-4). Also appearing in the appendix is the memorandum opinion of the district court (James McGirr Kelly, J.) granting summary judgment in favor of respondents and against petitioner. (App. A-5 to A-19). The decision of the court of appeals affirming the grant of summary judgment is reported at 17 F.3d 1430 (3d Cir. 1994).

JURISDICTION

On February 25, 1994, the United States Court of Appeals for the Third Circuit denied petitioner's petition for rehearing of the judgment entered on January 26, 1994. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The following appear in the appendix: 49 U.S.C. App. § 1305(a) and 49 U.S.C. § 1506 of the Federal Aviation Act, as amended, and Rules 56(c) and 56(e) of the Federal Rules of Civil Procedure as they existed at the time summary judgment was entered.

STATEMENT OF THE CASE

On February 1, 1985, Matthew Macario died when the aircraft he was operating lost engine power and crashed on approach to the Millville Airport in Millville, New Jersey. The accident airplane was a King Air A100 aircraft manufactured by Beech Aircraft Corporation ("Beech"), equipped with two PT6A engines manufactured by Pratt & Whitney Canada, Inc. ("PWC"). Wrongful death and survival actions were filed in the United States District Court for the Eastern District of Pennsylvania (hereinafter *"Macario I"*). Macario proceeded to trial against PWC only in November of 1989.

At trial, Macario proved that a defect in the PT6A powerplant allowed airborne contamination to cause the automatic fuel control of the engine to fail, resulting in a loss of engine power which ultimately caused the fatal crash. The jury heard testimony that the contamination problem could be eliminated by installation of a filter on the P3 air line to the fuel control unit, that in 1981 PWC had issued Service Bulletin 1330 making installation of the P3 filter optional,[1] and that the P3 filter was

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1. Service bulletins are issued by manufacturers to alert owners and operators to mandated or optional service requirements. Service bulletins and any revisions thereto are generally approved by "DAR", which means that someone at PWC stands in the shoes of the Federal Aviation Administration ("FAA") and certifies or approves service bulletins on its behalf. Such approval is a sign-off by PWC Product Support requiring no administrative approval by the FAA to be effective.

required by manufacturers other than Beech on their aircraft equipped with the very same engines to avoid a loss of power.

At the same time *Macario I* was pending, a class action complaint was filed by Sunbird Air Services, Inc. in the United States District Court for the District of Kansas against PWC, Beech, Bendix Avelex, and others asserting various statutory and common law claims for damages on behalf of the owners and operators of King Air airplanes which were not equipped with P3 filters (hereinafter *"Sunbird"*), a case in which Beech and PWC had substantial financial exposure.

During its deliberations, the Macario I jury posed written questions to the trial court concerning jury interrogatory number 4, dealing with punitive damages, telegraphing to all counsel that compensatory damages would be awarded and that punitive damages were under consideration. Only then, faced with the realization that a liability verdict was going to be returned against it, did PWC's counsel approach Macario's counsel about settling before verdict. As part of the settlement, and in exchange for no verdict being rendered by the jury, PWC agreed to reissue Service Bulletin 1330 marked "priority" and to be issued "as soon as practical," as well as to advise aircraft owners and operators that such filters could avoid contamination that would result in loss of engine power. The terms of the settlement were hammered out and approved in chambers with the simultaneous concurrence of the trial judge, PWC Engineering, and all counsel.

PWC did not reissue Service Bulletin 1330, however; thus, Macario commenced this action on June 8, 1990 seeking damages from PWC for breach of contract and from Beech for tortious interference with contract. Macario alleged that PWC agreed to reissue Service Bulletin 1330 solely to avoid the preclusive effect such a verdict would have on the *Sunbird* class action, but had no intention of ever reissuing it as agreed, and that it acted in concert with Beech, a multimillion dollar customer, to evade reissuing Service Bulletin 1330. A second amended complaint was filed with leave of court on March 5, 1991, alleging, *inter alia*, breach of contract, tortious interference with contract, misappropriation, conspiracy, concerted action, unjust enrichment, and fraud in the inducement.

On March 1, 1994, at the request and connivance of Beech and PWC, a Notice of Proposed Rulemaking ("NPRM") was published in the Federal Register, in which the FAA proposed to amend 14 C.F.R. pt. 39 "to adopt a new airworthiness directive. . .which would require the removal of the P3 filter assembly", 56 Fed. Reg. 8733 (Mar. 1, 1991), but only from those aircraft built by Beech, even though aircraft manufactured by other manufacturers (but not defendants in the class action) and equipped with the very same engines were excluded. The NPRM was prompted by certain flight tests conducted by Beech as a result of the *Macario I* settlement, and affected approximately 4,330 aircraft and engines which had been subject to Service Bulletin 1330. Only the Macario aircraft, the model A100, was not affected.

PWC moved for a stay under the doctrine of primary jurisdiction on March 11, 1991, on the ground that the airworthiness directive which the FAA proposed to issue (1) would disallow the reissuance of Service Bulletin 1330 and (2) would be dispositive of all of the issues in this case. Shortly thereafter, on April 21, 1991, PWC issued Alert Service Bulletin A-1330, marked "priority", which required the installation of the P3 filter on the A100 model only.

On May 31, 1991, PWC and Beech filed motions for summary judgment. PWC's motion alleged contractual and legal impracticality, mutual mistake of fact, and lack of damages, among other defenses, and argued that PWC had discharged its obligations under the settlement contract by issuing Service Bulletin A-1330. Beech, on the other hand, contended that Macario could not collaterally attack the FAA's decision, that Macario's claims were barred by the doctrine of federal preemption, and that its conduct was protected under the first amendment, among other defenses.

On June 11, 1991, before Macario could file a response to the summary judgment motions, the trial court stayed the proceedings "until the Federal Aviation Administration decides the issue of whether to enact the proposed rule at 56 Fed. Reg. 8733 (1991) (to be codified at 14 C.F.R. pt. 39)." Thirteen

months later, 14 C.F.R. § 39.13 was amended to include the new airworthiness directive, AD 92-15-11. 57 Fed. Reg. 31654 (July 17, 1992).

When finally issued, AD 92-15-11 did not say that P3 filters were dangerous or detrimental to aircraft operations. Rather than a blanket prohibition against installation of the P3 filters, the FAA determined, based on data supplied solely by Beech (at engine fuel control settings that PWC said made the engine being used uncertifiable), that filters could be detrimental in the balked landing configuration only. 57 Fed. Reg. 31654. Most importantly of all, the AD provided:

> [R]elative to the original intent of the PWC filter option, the FAA has coordinated with PWC to define a test program that may identify an engine configuration allowing P3 filters to remain as an option. *This AD will be amended to include a P3 filter installation option if it is developed.*

57 Fed. Reg. 31657 (emphasis supplied).

The stay was lifted on August 26, 1992. Macario submitted deposition testimony and expert affidavits in opposition to the motions, and pointed out that PWC's partial compliance came only after Macario incurred considerable litigation expense, and then because it affected only a few hundred airplanes.

After entertaining oral argument, by memorandum and order entered on February 12, 1993, the district court granted the motions for summary judgment in all respects. The court determined the question before it with respect to the breach of contract claim to be "whether or not the terms of the settlement agreement can prevail over the FAA," and answered that question by concluding that PWC had reissued Service Bulletin A-1330 in conformity with the terms of the airworthiness directive, and thus complied to the best of its ability and its duty as far as issuing the service bulletin was discharged. (App. A-8, A-9). The court also concluded that Beech's actions fell within the *Noerr-Pennington* doctrine and it was therefore immune from tort liability. (App. A-12).

Macario took a timely appeal to the United States Court of Appeals for the Third Circuit. After stating that the facts of the case were adequately set forth in the district court's opinion

dated February 11, 1993, the United States Court of Appeals for the Third Circuit concluded that the district court properly granted summary judgment. (App. A-3). The court of appeals concluded that, to the extent possible, Pratt conformed with the settlement agreement and did not breach its contractual obligations, and likewise upheld the grant of summary judgment on the misappropriation count, reasoning that because the FAA's action prevented PWC from issuing the service bulletin in strict conformance with the settlement agreement, Macario had no property interest in the service bulletin. (App. A-3). The court concluded as well that the tortious interference with contract, civil conspiracy, and concerted action counts were barred on first amendment grounds. (App. A-3).

REASONS FOR GRANTING THE WRIT

The failure by the court of appeals to afford plenary review, the failure to afford *de novo* analysis of the applicable law, the neglect of uncontroverted mistakes of fact by the district court, and the disregard of reported decisions by the Court on summary judgment and federal preemption, all compounded an injustice by allowing a summary judgment that should never have been entered to be affirmed. This result is not only inherently unfair, but constitutes appellate deference forbidden by the decisions of the Court.

The Court's guidance is required because the decision by the court of appeals sends a terrible message to litigants. Now, a settlement reached before a federal judge to avoid a punitive damage verdict becomes a sham, just another legal tactic to avoid decision by a jury. This precedent sends an unsavory message to litigants and their lawyers, and brings discredit to our judicial institutions, in particular the federal judiciary. If this decision is allowed to stand, no lawyer should again settle a case with the supervision of a federal judge and expect compliance by the settling party or seek enforcement by the district court in the absence of such compliance.

The Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) sought to work a delicate balance between the right to a

jury trial and the right to be spared the burden and expense of a jury trial where there is no factual basis therefor. These decisions were not intended as a means to allow wholesale docket-clearing or to allow difficult cases to be swept under the procedural rug of summary disposition.

The Court specifically cautioned in *Anderson v. Liberty Lobby* that the court's function on summary judgment is not "to weigh the evidence and determine whether there is a genuine issue for trial." 477 U.S. at 249. By ignoring the "significantly probative" evidence proffered by Macario, *id.*, the trial court and the court of appeals after it acted as fact-finder and ran afoul of their duties as defined by the Court in *Anderson*.

By interpreting the airworthiness directive as preemptive and by failing to read it in toto to encompass the language allowing P3 filter installation, the decision of the court of appeals is at odds with the decisions of this Court on federal preemption, most recently *Cipollone v. Liggett Group*, 112 S. Ct. 2608 (1992) and the decisions of the Tenth and Eleventh Circuits in *Cleveland v. Piper Aircraft Corp.*, 985 F. 2d 1438 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993) and *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993). Consideration by the Court is required, then, to ensure the uniformity and consistency of review on the preemptive effects of the federal aviation regulations on state common law claims.

Lastly, this case presents a question of first impression whether the *Noerr-Pennington* doctrine applies outside the antitrust context, where the litigants generally are competitors with similar means, comparable to protect their business interests, and equal access to the administrative and legislative processes. If such protection does apply, the Court should grant certiorari to delineate the limits of that protection and the showing necessary to demonstrate sham-petitioning outside the antitrust context.

De novo review is meaningless if no review takes place. In its decision, the Third Circuit, may truly be said,

> has so far departed from the accepted and usual course of judicial review as to call for an exercise of the court's power of supervision.

Sup. Ct. R. 10.1(a).

I. THE WEIGHING OF EVIDENCE AND THE LACK OF INDEPENDENT, NONDEFERENTIAL REVIEW IS INCONSISTENT WITH THE APPLICABLE STANDARD OF REVIEW AND IN CONFLICT WITH APPLICABLE DECISIONS OF THE COURT.

In affirming the district court's grant of summary judgment, the court of appeals stated: "The facts of this case are adequately set forth in the district court's opinion dated February 11, 1993." (App. A-2 to A-3). The facts of the case as set forth in the district court's opinion are neither adequate nor accurate.

For instance, the district court stated in its opinion that "Pratt & Whitney and Beech conducted flight tests and reported their findings to the FAA." (App. A-6). There was no record evidence that Pratt conducted flight tests; indeed, this was perhaps the only fact that was not in dispute. This misapprehension of a most material fact by the district court goes to the very heart of this controversy. Macario's case rested on proof, through his experts, that there were a number of things Pratt could have done, *including flight tests*, to satisfy the FAA, to allow the AD to be amended to include the filter (or not issued at all had PWC taken such steps in the first instance), and to enable it to reissue Service Bulletin 1330 to discharge its obligations under the settlement agreement. Had the court of appeals discharged its duty of responsible appellate review, it would not have, nor could it have, wholeheartedly embraced the district court's erroneous factual findings and misapplication of the law.

Summary judgment orders are subject to *de novo* or plenary review.[2] This standard is most frequently articulated to

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2. The courts of appeals are in agreement on this standard. *See, e.g., Stone Forest Industries, Inc. v. United States*, 973 F.2d 1548 1550 (Fed. Cir. 1992) (plenary review); *A-L Associates, Inc. v. Jordan*, 963 F.2d 1529, 1530 (D.C. Cir. 1992) (*de novo* review); *Wells v. United States Steel Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1247 (6th Cir. 1992) (*de novo* review); *Taggart v. Time, Inc.* 924 F.2d 43, 45-46 (2d. Cir. 1991) (*de novo* review); *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 177 & n.34 (5th Cir. 1990) (plenary review); *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990) (plenary review); *United Bank & Trust Co. v. Kansas Bankers Surety Co.*, 901 F.2d 1520, 1522 (10th Cir. 1990) (*de novo* review); *In re*

state that the reviewing court applies the same standard that the district court used or should have used initially. *See, e.g., Quinn v. Stone,* 978 F. 2d 126, 131 (3d Cir. 1992). The problem in this case is that no standard was applied.

What the trial court cannot do on summary judgment is decide issues of fact. *Anderson,* 477 U.S. at 244, nor can the reviewing court engage in independent de novo review without ascertaining that the district court did not do so. *Abourezk v. New York Airlines, Inc.* 895 F.2d 1456, 1458 (D.C. Cir. 1990). ("[F]irst, we must be sure that the district court has not overlooked or impermissibly resolved any disputed material facts, and second we must ensure that trial judge correctly applied the law to these undisputed facts)". But that is exactly what the trial court did here, with the stamp of approval of the court of appeals.

Certiorari should thus be granted to provide further clarification to the lower courts on the standard that is to be applied by the trial court in the first instance and by the appellate courts in their de novo survey of the record. In *Anderson v. Liberty Lobby, Inc.* 477 U.S. 259 (1986), the Court held that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Id.* at 255. The questions left open by Anderson were "how these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment." *Id.* at 258 (Brennan, J., dissenting) (emphasis in original). *See also id.* at 269 (Rehnquist, J., dissenting) ("The Court fail[s] to apply its newly announced rule to the facts of this case").

Review is also necessary for further clarification as to how the non-moving party defeats summary judgment and satisfies the "evidentiary standards that apply to the case" and the burden-shifting which occurs once he does so. Rule 56(e) requires a nonmoving party to go beyond the pleadings and, by his own affidavits or other Rule 56 evidentiary materials, designate specific facts showing that there is a genuine issue for

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Franklin, 891 F.2d 1555, 1560 (11th Cir. 1990); *McMillian v. Svetanoff,* 878 F.2d 186, 188 (7th Cir. 1989) (*de novo* review).

trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). This showing cannot be "merely colorable" or "not significantly probative." *Id.* at 324.

Macario submitted affidavits from the former Chief of the Propulsion Section of the FAA's Aircraft Engineering Division, Central Region, the former Chief of Engineering Flight Tests of the FAA Wichita, a former test pilot for Piper Aircraft Corporation, and a former PWC employee. The expert affidavits offered by Macario looked to the plain language of the AD that it *can be amended* to include P3 filters. Macario's experts stated in their affidavits, and would likewise have testified at trial, that there are a number of things PWC could have done to obtain full FAA approval for the revised service bulletin, such as performing flight tests in accordance with the already existing Beech minimum specifications by specifying a set of fuel control, operating, and maintenance criteria which would ensure adequate acceleration of the engine and the AD would then have been inapplicable to the aircraft or engines to which it is now directed.

Macario made this showing by submitting affidavits from his experts, gentlemen with decades of experience in the FAA and the industry.[3] The affidavits went unanswered, with neither defendant offering a single affidavit from their own engineers, product support people, or test pilots to dispute Macario's

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3. In addition to these affidavits, Macario submitted a host of other evidence, including the deposition testimony of both of PWC's trial attorneys and a claims attorney employed by PWC's insurer showing that PWC had done legal research months before the trial on the preclusive effect of an adverse verdict in *Macario I* on the *Sunbird* litigation, that its lawyers were doing the same research the day Macario I settled, that the motivating factor behind the settlement was avoidance of a jury verdict, and other evidence tending to show state of mind. Macario also provided the district court with a document trail consisting of Beech and PWC's own business records, demonstrating that Beech went into action immediately after the settlement to make certain that the service bulletin never issued, that Beech never complained in the eight years prior to the settlement that the filters raised "safety of flight" concerns, that Beech flight tests were deliberately flawed, and that PWC issued other service bulletins requiring the filter to be installed without prior notice to the FAA.

expert affidavits, but electing instead to rely solely on the arguments of counsel in their briefs against these affidavits.

Though the Court has held that the moving party need not support a motion for summary judgment with affidavits, 477 U.S. at 323-24, once the non-moving party comes forward with evidence to support his claim, the moving party must make some affirmative showing, through affidavits or otherwise, to dence of a genuine issue of material fact. *See id.* at 328 (White, J., concurring) (had non-moving party named a witness to support her claim, summary judgment should not be granted without showing by moving party that witness' possible testimony raises no genuine issue of material fact). No such showing was made here.

By failing to look at the district court's actions with a critical and nondeferential eye, the court of appeals abdicated its duty of responsible appellate review. "Where de novo review is compelled, no form of appellate deference is acceptable". *Salve Regina College v. Russell,* 111 S. Ct. 1217, 1224 (1991). This Court should review the deference afforded the summary judgment determinations by the court of appeals.

II. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THIS COURT'S PREEMPTION DECISIONS AND IS AT ODDS WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE INTERRELATIONSHIP BETWEEN STATE TORT LAW REMEDIES AND FEDERAL REGULATION OF AVIATION SAFETY.

The district court framed the issue before it as follows: "[W]hether or not the terms of the settlement agreement can prevail over the FAA." (App. A-8). The court of appeals affirmed because "the district court correctly determined that the FAA issued an airworthiness directive on July 16, 1992, which made it impracticable for Pratt & Whitney to conform with the precise terms of the settlement agreement" and "[s]ince the FAA's action prevented Pratt from issuing the service bulletin in strict conformance with the settlement agreement." (App. A-3). Explicit in the district court's opinion, and implicit in the court

of appeals' opinion, is the finding that the FAA regulation and Macario's state law claims are mutually exclusive and that the tort claims somehow were preempted once the airworthiness directive issued. To reach this interpretation, the express language of the regulation to the contrary was ignored, as was authority cited by Macario that another court interpreting this very regulation – the *Sunbird* court – held the regulation did not preempt state law damage claims. *Sunbird Air Services, Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 360, 362 (D. Kan. 1992).

This interpretation of the regulation also runs afoul of the Court's preemption decisions and the decisions of other circuits, in particular, the Tenth and Eleventh Circuits, on the relationship between the federal aviation regulations and state law tort claims. The opinions of the Court teach that federal preemption may be triggered in one of three ways: (1) an express preemption clause in a federal statute; (2) implied preemption by virtue of a "clear and manifest" intent to occupy a given field to the exclusion of state common law, otherwise known as "field preemption"; and (3) implied preemption where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to accomplishing and executing the full purposes and objectives of Congress, also known as "conflict preemption". *See generally Gade v. National Solid Wastes Management Association*, 112 S. Ct. 2374, 2383 (1992). Macario's state law claims are neither expressly nor implicitly preempted by the promulgation of the AD.

The first prong – express preemption – is not applicable. The Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1301 *et seq.*, governs two broad areas of congressional concern in aviation: (1) rates and routes of air carriers and (2) air safety. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1444 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993). The Act contains an express preemption provision "relating to rates, routes, or services of. . .air carrier[s] . . . ." 49 U.S.C. App. § 1305(a). There is no such express preemption provision for air safety. Consequently, the area of air safety is not preempted because it is "beyond [the] reach of the express preemption provision." *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2618 (1992); *Cleveland, supra*, 985 F.2d at 1444 (footnote omitted).

The Act also contains a "general remedies savings clause", *Morales v. Trans World Airlines, Inc.* 112 S. Ct. 2031, 2037 (1992), which specifically provides that "[n]othing contained in [the Federal Aviation Program] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter *are in addition to such remedies.*" 49 U.S.C. App. § 1506 (emphasis added). Section 1506 shows that Congress did *not* intend to occupy the field of airplane safety to the exclusion of state common law. *In Re Air Crash Disaster at John F. Kennedy International Airport,* 635 F. 2d 67, 74-75 (2d Cir. 1980). So, too, in this case, the absence of an express preemption provision, coupled with the savings clause, means that Congress did *not* preempt state common law in the area of air safety. *Public Health Trust v. Lake Aircraft, Inc.,* 992 F. 2d 291, 294-95 & n.3 (11th Cir. 1993); *Cleveland, supra,* 985 F.2d at 1443.

Where Congress has not enacted an explicit preemption clause, state law may still be displaced if an intent to preempt is "implicitly contained in [the federal statute's] structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). This question turns on congressional intent. *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 299 (1988). Nevertheless:

> [t]he mere fact that Congress has enacted detailed legislation addressing a matter of dominant federal interest does not indicate an intent to displace state law entirely. *English v. General Elec. Co.,* 496 U.S. 72, 87, 110 S. Ct. 2270, 2279, 110 L.Ed.2d 65 (1990); *Hillsborough County v. Automated Medical Lab, Inc.,* 471 U.S. 707, 716-20, 105 S. Ct. 2371, 2376-79, 85 L.Ed.2d 714 (1985). Congress may reserve for the federal government the exclusive right to regulate safety in a given field, yet permit the states to maintain tort remedies covering much the same territory. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 253, 104 S. Ct. 615, 624, 78 L.Ed.2d 443 (1984). This is so even though an award of damages may have the same effect as direct state regulation. *See San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247, 79 S. Ct. 73, 78, 3 L.Ed.2d 775 (1959).

Cleveland, supra, 985 F.2d at 1441.

Indeed, "where Congress has with words pre-empted some kinds of state lawmaking, courts are cautious about relying on implied preemption theories to limit state authority further." *Public Health Trust v. Lake Aircraft, Inc., supra,* 992 F.2d at 294. A majority of this Court in Cipollone concluded that the doctrine of implied preemption is generally inapplicable where the statute contains an express preemption provision. *Cipollone v. Liggett Group, supra,* 112 S. Ct. at 2618 (plurality opinion); *id.* at 2625 (Blackmun, J., concurring); *id.* at 2633 (Scalia, J., dissenting in part).

Under the authority of *Cipollone*, field preemption is not applicable because the Act contains a preemption provision and the regulations promulgated thereunder do not evince congressional intent to displace state law tort remedies. The Tenth Circuit in Cleveland concluded that Congress did not indicate a "clear and manifest" intent to occupy the field of airplane safety to the exclusion of state law, but by virtue of the savings clause, that Congress has intended to allow state common law to stand side by side with the system of federal regulations it has developed. 985 F.2d at 1444.

The third and final way federal preemption may be triggered is if a party's state law claims create an irreconcilable conflict with federal law. In conflict preemption, the test is whether state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 57 (1941). "The crucial inquiry is not whether state law reaches matters also subject to federal regulation, but whether the two laws function harmoniously rather than discordantly." *Holliday v. Bell Helicopters Textron, Inc.,* 747 F. Supp. 1396, 1401 (D. Haw. 1990) (quoting *Morseburg v. Baylon,* 621 F2d 972, 978 (9th Cir.), *cert denied,* 449 U.S. 993 (1980)).

In *Cleveland v. Piper Aircraft Corp., supra,* Piper Aircraft Corporation contended, among other things, that the plaintiff's state law tort claims were impliedly preempted because the federal regulatory framework actually conflicts with state common law duties. *Cleveland, supra,* 985 F.2d at 1445. The *Cleveland* court rejected outright the contention that Congress

intended the regulation of air commerce to be a purely federal function. The court concluded instead that Congress intended to allow state common law to stand side by side with the system of federal regulations it has developed." 985 F.2d at 1445.

The court of appeals' decision is at odds with the Tenth Circuit's decision in *Cleveland* and the Eleventh Circuit's decision in *Public Health Trust*, the two most recent and noteworthy appellate decisions on preemption in the aviation context. The Federal Aviation Regulations – whether dealing with the certification of aircraft as in *Cleveland and Public Health Trust* or dealing with the issuance of airworthiness directives as in this case – are minimum standards only and are "not intended to be the last word on safety." *Cleveland*, 985 F.2d at 1446.

The decision of the Third Circuit, in conflict with the decisions of the Court and other circuits, should be set aside and reversed.

III. THE COURT'S GUIDANCE IS NEEDED TO PASS UPON QUESTIONS OF FIRST IMPRESSION CONCERNING THE APPLICABILITY OF NOERR-PENNINGTON PRINCIPLES OUTSIDE THE CONTEXT OF ANTITRUST LITIGATION.

The court of appeals, in affirming the grant of summary judgment as to the civil conspiracy, concerted action, and tortious interference with contract claims concluded that "the district court correctly determined that Beech has a First Amendment right to induce lawful government action. *See, e.g., Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984)." (App. A-3). *Omni Resource*, however, was a decision involving application of the *Noerr-Pennington* doctrine in the antitrust context.

Under *Noerr-Pennington*, a party may not be held liable under the antitrust laws for seeking to persuade government officials to take particular action, even where the sole aim is to promote its competitive position in the market place to the detriment of a competitor. This doctrine is in part a constitutionally-based doctrine limiting the application of the

Sherman Act. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). In *Noerr, supra,* the Court first focused on the tension between the first amendment and the Sherman Act, holding that Congress had not intended the Sherman Act to apply to "activities compris-[ing] mere solicitation of governmental action with respect to this passage and enforcement of law." *Id.* at 138. The Court nevertheless cautioned:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act will be justified.

Id. at 144.[4]

In *California Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972) the court applied *Noerr* to administrative and adjudicative proceedings, and was the first time this Court applied the sham exception referred to in *Noerr.* The *California Motor Court* confirmed that the *Noerr-Pennington* doctrine rested squarely upon the first amendment rights of petition and association and held that a group of trucking companies' opposition to each and every licensed application made by their competitors "with or without probable cause, and regardless of the merits of the cases," did not deserve *Noerr-Pennington* immunity. 404 U.S. at 510-12.

This Court has never expressly decided the question whether the *Noerr-Pennington* doctrine extends outside the boundaries of the antitrust laws. *Hufsmith v. Weaver*, 817 F.2d 455, 458 (8th Cir. 1987). Some courts have expressly held that

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4. Subsequently, in *United Mine Workers of America v. Pennington,* 381 U.S. 657, 670 (1965), the Court held that *Noerr* protected the efforts of large mine owners and union officials to squeeze out smaller coal producers by persuading the Secretary of Labor to raise minimum wage levels:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

the doctrine does apply outside the antitrust area whereas others have cited its reasoning in cases other than antitrust cases without reaching this conclusion. *Compare Hufsmith,* 817 F.2d at 458 *with Brownsville Golden Age Nursing Home v. Wells,* 839 F.2d 155, 160 (3d Cir. 1988). This Court as well has looked to the *Noerr* doctrine at least once in a non-antitrust context, though without expressly deciding its applicability in cases other than those under the federal antitrust statutes. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913-14 (1982).

If *Noerr-Pennington* protections are in fact applicable in non-antitrust cases, the Court should grant certiorari to affirmatively answer this question of first impression and to address the showing sufficient to defeat summary judgment by virtue of the doctrine and to show that the conduct at issue is unprotected activity under the first amendment. Indeed, both the district court and the court of appeals appear to have adopted a per se rule; that is, simply because Beech contacted the FAA in order to have governmental action taken, all of its actions were protected constitutional activity. The Court has rejected the view "that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 503 (1988).

Macario presented evidence from which the jury could infer that it was the use of the process itself, rather than the outcome, which was the liability-producing conduct. *City of Columbia v. Omni International Advertising, Inc.,* 111 S. Ct. 1344, 1354 (1991). Indeed, Macario established that not only was the information provided to the FAA false, but that in an unprecedented fashion the FAA ignored all but one (Beech's) of the twenty-three comments against the regulation. *See* 57 Fed. Reg. 31654 (July 17, 1992). Everyone who did not have a litigation interest, including the National Transportation Safety Board, argued against the issuance of the AD. Macario produced evidence from which the jury could find that the entire regulatory process, from start to finish, was orchestrated by litigation counsel for the respondents and their product liability lawyers.

In the face of such evidence of the petitioning activity being a litigation ploy to defeat the *Sunbird* lawsuit and notwithstanding the revelation that PWC was simultaneously recommending the filter on the same engines on other aircraft, the court below refused to recognize Macario's right to prove the sham exception to the jury. This result cries out for review by the Court.

CONCLUSION

The decisions by both of the courts below are totally at odds with the precedents of the Court. The court of appeals totally failed to perform an independent, *de novo* review of the facts in affirming the summary judgment entered by the trial judge, totally misapplied the law of federal preemption by refusing to allow state-based damage claims to proceed in the face of a federal "minimum standard" air safety regulation, and denied Macario, in the face of uncontroverted evidence, the opportunity to prove a sham exception to the *Noerr-Pennington* doctrine even if it applied out of the antitrust context.

In sum, the court below tossed aside the state-based breach of contract claims even though the federal agency at issue did not prohibit compliance with the contract. The questions presented to this Court are of critical importance because clearly there is an absence of clarity in the Court's standards to be applied in the appellate review of summary judgment, the application of *Noerr-Pennington* doctrine to non-antitrust cases, and whether federal preemption precludes state-based damage claims where the conduct of a federal agency does not prohibit performance.

For all the foregoing reasons, therefore, certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1567

T. MICHAEL MACARIO, III, Administrator
of the Estate of Matthew Macario, Deceased,
Appellant

v.

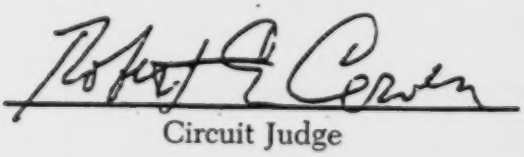
PRATT & WHITNEY CANADA, INC., A
Subsidiary of United Technologies Corporation;
BEECH AIRCRAFT CORPORATION

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge;* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,



Circuit Judge

Dated: FEB 25 1994

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1567

T. MICHAEL MACARIO, III,
ADMINISTRATOR OF THE ESTATE OF
MATTHEW MACARIO, DECEASED

Appellant,

v.

PRATT & WHITNEY CANADA, INC.,
A SUBSIDIARY OF UNITED TECHNOLOGIES
CORPORATION and BEECH AIRCRAFT CORPORATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 90-03906)
District Judge: Hon. James McGirr Kelly

Submitted Under Third Circuit LAR 34.1(a)
January 11, 1994

Before: STAPLETON, COWEN and ALITO
Circuit Judges

(Filed JAN 28 1994)

MEMORANDUM OPINION OF THE COURT

COWEN, *Circuit Judge.*

T. Michael Macario appeals the order of the district court granting summary judgment in favor of Pratt & Whitney Canada (Pratt) and Beech Aircraft Corporation (Beech). The facts of this

case are adequately set forth in the district court's opinion dated February 11, 1993.

The district court properly granted summary judgment in favor of Pratt as to the counts for breach of contract, misappropriation, civil conspiracy, concerted action, unjust enrichment and fraud in the inducement, and properly granted summary judgment in favor of Beech as to the counts for tortious interference with contract, misappropriation, civil conspiracy, concerted action, unjust enrichment, and fraud in the inducement.

As to the breach of contract claim, the district court correctly determined that the FAA issued an Airworthiness Directive on July 16, 1992, which made it impracticable for Pratt to conform with the precise terms of the settlement agreement it entered into with Macario. To the extent possible, Pratt conformed with the settlement agreement and therefore did not breach its contractual obligations. *See, e.g., Lichtenfels v. Bridgeview Coal Co.*, 531 A. 2d 22, 25-26 (Pa. Super. Ct. 1987).

As to the claim for tortious interference with contract, the district court correctly determined that Beech has a First Amendment right to induce lawful government action. *See, e.g., Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1413 (9th Cir. 1984).

The district court properly granted summary judgment in favor of Pratt and Beech on Macario's misappropriation count. Since the FAA's action prevented Pratt from issuing the service bulletin in strict conformance with the settlement agreement, it cannot be argued that Macario had a property interest in the service bulletin.

With regard to the claims for civil conspiracy and the tort of concerted action, the district court properly determined that insufficient evidence exists in the record to establish a genuine issue of material fact concerning wrongful activity on the part of Pratt or Beech. Moreover, as noted above, Beech's actions in seeking FAA determinations is protected activity under the First Amendment, and therefore such activity cannot form the basis of a civil conspiracy or tort of concerted action claim.

As to the claim for unjust enrichment, this claim has no merit, for under Pennsylvania law, "the quasi-contractual doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded on a written agreement or express contract." *Hershey Foods v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987).

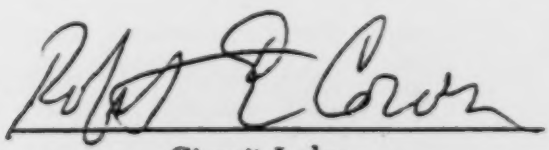
The claim for fraud in the inducement of the Settlement Agreement was properly disposed of by summary judgment. Macario has failed to adequately demonstrate any measurable damages that would have resulted, even assuming that fraud could be proved. Because no genuine issue of material fact exists as to the question of damages, the district court properly granted summary judgment in favor of Pratt and Beech. *See Kaufman v. Mellon Nat'l Bank and Trust Co.*, 366 F.2d 326, 331 (3d Cir. 1966).

It is unclear whether Macario properly raised the question of whether the district court erred in denying Macario's Motion for Reconsideration, since it is an argument Macario raised for the first time in this court only in its Reply Brief. In any event, the district court did not err in denying the Motion for Reconsideration, since Service Bulletin 1448 is not newly discovered evidence.

We have carefully considered all of the issues and arguments raised by Macario, and we find that the district court's judgment is correct in all respects. The orders of the district court dated February 11, 1993 (filed February 12, 1993) and May 10, 1993 (filed May 11, 1993), will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.



Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

T. MICHAEL MACARIO, III, ADMINISTRATOR of the Estate of Matthew Macario, Deceased, *Plaintiff,*	:	CIVIL ACTION
v.	:	
PRATT & WHITNEY CANADA, INC. and BEECH AIRCRAFT CORP., *Defendants.*	:	NO. 90-3906

MEMORANDUM

J. M. KELLY, *J.* February 11th, 1993

Presently before the court is Defendant Pratt & Whitney Canada's ("Pratt") motion for summary judgment on Counts I, III, IV, V, VI, VII of Plaintiff's Second Amended Complaint. Also before the court is Defendant Beech Aircraft Corporation's ("Beech") motion for summary judgment against Plaintiff Macario. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

Plaintiff Macario is the Administrator of the Estate of Matthew Macario, deceased. On February 1, 1985, in Cedarville, New Jersey, Matthew Macario was killed in a crash of a Beechcraft King Air. Defendant Pratt manufactures the aircraft powerplant engine known as the PT-6. Defendant Beech is a manufacturer of airplanes and airplane parts.

Macario filed a lawsuit against Pratt, Beech and others entitled *T. Michael Macario, Administrator of the Estate of Matthew Macario v. United Technologies Corp., et. al.*, Civil Action No. 86-4951 (E.D. Pa. filed Aug. 21, 1986) ("Macario I"). Prior to the trial Macario and Beech settled. Before the jury deliberations had been completed in *Macario I*, Plaintiff and

Pratt reached a settlement agreement. One term of the settlement agreement required Pratt to pay Plaintiff six million dollars. The other term demanded Pratt to issue a service bulletin "as soon as practical" about the installation of P-3 filters.

Prior to the issuance of the Service Bulletin, certain safety issues had been raised concerning the installation of the P-3 filter. As a result, the Federal Aviation Administration ("FAA") and the Department of Transport Canada ("DOT") requested Pratt to delay the issuance of the Service Bulletin. Pratt complied with this request.

In connection with the issuance of the Service Bulletin, Pratt and Beech conducted flight tests and reported their findings to the FAA.

In June of 1990, before the tests were completed, Plaintiff brought this action. Plaintiff filed this Second Amended Complaint on March 5, 1991. The court issued a stay pending the conclusion of the FAA tests.

Finally, on July 17, 1992, after numerous tests on the P-3 filter, the FAA issued an Airworthiness Directive ("AD"). The AD directed P-3 filters to be removed.

In the instant complaint, Plaintiff claims that Pratt has breached the settlement agreement by failing to issue, immediately, the required Service Bulletin. Plaintiff claims that Beech "tortiously, wantonly and with reckless indifference to the safety of others" influenced Pratt in the non-issuance of the Service Bulletin. Plaintiff alleges that as a result of the delay, they are entitled to an additional three (3) million dollars. It is further alleged that they are entitled to damages from Beech for interference with contractual relations between Plaintiff and Defendant Pratt.

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. *See id.* at 255.

While the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Therefore, the party opposing the motion must come forward with "more than a mere scintilla of evidence in its favor" and " 'cannot simply reassert factually unsupported allegations contained in its pleading.' " *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (citing *Anderson*, 477 U.S. at 249 and 325).

DISCUSSION

I. Count I

In Count I of the Second Amended Complaint, Plaintiff alleges that Pratt has breached the settlement agreement. As a result of the delay in the issuance of the Service Bulletin, Plaintiff claims entitlement to three (3) million dollars in damages.[1]

Pratt moves for Summary Judgment on this Count. In support, Pratt claims that they are in full compliance with the terms of the settlement agreement. Pratt alleges that the words of the settlement agreement required them to issue the service bulletin "as soon as practical". The FAA has concluded that P-3 filters can be installed in aircrafts certified at higher idle speeds. However, the P-3 filters create unsafe conditions in low idle

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1. This figure was calculated by subtracting the original amount asked for in the settlement negotiations, nine (9) million dollars, and the final amount settled for, six (6) million dollars.

setting aircrafts. (*See* Defendant Pratt's Supplemental Mot. for Summ. J., Exhibit C.) Pratt issued Service Bulletin 1330 in accordance with these findings. Pratt claims that they have complied with the settlement agreement to the best of their ability under the circumstances. Pratt asserts that the issuance of the Service Bulletin, with the wording originally requested, would recommend actions creating unsafe conditions, thereby violating public policy.

Lastly, Pratt alleges that the terms of the agreement were premised on a mutual mistake of fact. Neither party was aware that the FAA and Transport Canada would have safety concerns about the installation of P-3 filters.

In response, Plaintiff claims that on April 29, 1991 Pratt issued a revised service bulletin. This bulletin only applied to the Beech King Air A100 model aircraft and not the thousands of other aircrafts that it was originally intended to effect. Plaintiff claims that Pratt's lack of action did not satisfy the terms in the service agreement "as soon as practical".

Plaintiff insists that the impracticality argument fails in that the FAA has done nothing to prevent Pratt from issuing the bulletin. Plaintiff claims that Pratt has failed to define a test program identifying an engine configuration which would allow the P-3 filter. Plaintiff also declares that the Airworthiness Directive allows for alternate means of compliance, however Pratt has completely failed to take such steps.

After taking into consideration the numerous pleadings, supplemental submissions and hearing extensive oral argument, it appears that no triable issues of fact exist as to the breach of contract count. The issue raised is whether or not the terms of settlement agreement can prevail over the FAA.

On July 16, 1992, the FAA issued an Airworthiness Directive requiring the removal of the P-3 filter from Pratt PT6A series turboprop engines. (*See* 14 CFR Part 39, Pratt Supp. Mem. in Support Summ. J., Exhibit C.). Henceforth, Pratt issued the Service Bulletin in conformity with the terms of the Airworthiness Directive.

While the court is proficient in many areas, it preserves matters of safety in aviation to the expertise of the FAA. The

parties as well as the court's are dependant upon the authorizations submitted by the FAA in areas of aviation. Where the FAA has issued an Airworthiness Directive on a matter, it is the responsibility of this court and any agreement governed by this court to comply with such pronouncements. *See Philadelphia Federation, ETC.. v. Thomas,* 436 A.2d 1228 (1981) (where a contract is subject to a condition precedent within the control of an independent legislative body and such condition does not occur, the duties are discharged to extent of dependance upon the conditions occurrence.) The two parties negotiated under a mistake of fact. *Id.* Both mistakenly assumed that the Service Bulletin could be issued. However the FAA issued the AD contradicting the proposed Service Bulletin. Under these circumstance Pratt could only issue a limited Service Bulletin. Pratt has issued a Service Bulletin in accord with the AD. Pratt has complied to the best of their ability. Pratt's duties as far as issuing the exact Service Bulletin requested are discharged.

This court finds that under the circumstances Pratt has complied with the terms of the settlement agreement. Thus, Pratt has not breached the Settlement Agreement. Accordingly, Pratt's Motion for Summary Judgment on Count I shall be granted.

The court finds Plaintiff's request for damages to be unsupported. Plaintiff contends that the nine (9) million dollars originally asked for was eventually reduced to six (6) million dollars as a result of the agreement to issue Service Bulletin 1330. Therefore, Plaintiff insists that damages in the amount of three (3) million dollars are owed.

The court disagrees with Plaintiff's demand. Firstly, Plaintiff's estimation is arbitrary. Often during negotiations parties demand a higher dollar amount than the party is willing to settle for. This is what is commonly known as negotiating techniques. It is the courts understanding that the three (3) million dollar difference was a consequence of negotiations.

Secondly, the court finds Pratt to be in compliance with the Settlement Agreement. In situations such as this, where an independent party is responsible for the lack of complete compliance, the parties remain free from bearing complete responsibility or fault. *Philadelphia Federation, ETC. v.*

Thomas, at 1235. Neither blame nor responsibility can be placed on either party. *Id.* Therefore the terms of the agreement that can be complied with shall be enforced and the Service Bulletin shall be issued so as to enforce the FAA's Airworthiness Directive. Since Pratt is not in breach of the settlement agreement as it stands after the issuance of the Airworthiness Directive, Plaintiff is not entitled to damages.

II. COUNT II

In Count II Plaintiff alleges that Beech, with the sole intention of benefitting their position in the *Sunbird* litigation, interfered with the contractual relationship between Pratt and Plaintiff.

Beech moves for summary judgment on this claim alleging that they have done nothing more than exercise their constitutional right to petition the government. Consequently, no claims can be brought against them. Beech alleges that Plaintiff exercised their right as well, but failed to convince the FAA to conform to their position. Beech alleges that the actionable conduct was nothing more than Beech attempting to demonstrate to Pratt and the FAA that a safety flight hazard existed where P-3 filters were installed in Beech King Airs.

Beech asserts that they were not consulted by Pratt prior to the settlement agreement in *Macario I.* After becoming aware of the terms of the settlement agreement, Beech's Manager of Commercial products, Mr. Jacobson, advised Pratt that in 1981 Beech's engineering department had discovered that engines equipped with P-3 filters did not respond "satisfactorily to commands for acceleration." Jacobson advised Pratt that the service bulletin was unacceptable to Beech.

Beech met with the FAA and advised them of their concerns. Subsequently, the FAA decided to pursue appropriate engine ground and flight tests. The FAA notified the DOT of the potential dangers. Consequently, the DOT notified Pratt of the dangers and of the FAA's request to delay the service bulletin. Beech claims that the delay was the result of orders from governmental agencies and not the result of threats.

Beech alleges that before completion of the tests, the FAA's New England office notified DOT that no engine acceleration problems had been discovered. As a result of this false premise, the FAA gave permission to Pratt to release the bulletin at their discretion. Beech, unaware of this development, continued with their tests. The flight tests established a non-acceptable increase in acceleration with P-3 filters installed.

Tests and discussions continued until the FAA issued a final rule. The FAA required the inspection for and removal of P-3 filters from certain model PT6A engines. (*See* 14 CFR Part 39, Pratt Supp. Mem. in Support Summ. J., Exhibit C.).

Beech asserts that the First Amendment guarantees a right to petition the government. Beech insists that its actions are supported under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine states that actions taken to induce lawful government action are immune from anti trust liability. *Omni Resource Dev. Corp. v. Conoco, Inc.* 739 F.2d 1412, 1413 (9th Cir. 1984); *see also LeBlanc-Sternberg v. Fletcher,* 781 F.Supp. 261, 265 (S.D.N.Y. 1991). This immunity arises from the First Amendment's "guarantee of the right to petition the government for redress of grievances." *Lansdale v. Philadelphia Electric Co.,* 517 F.Supp, 218, 220 (E.D.Pa. 1981).

There is an exception to the *Noerr-Pennington* doctrine. The sham exception excludes from immunity those proceedings lacking in probable cause which are mere attempts to interfere with the business relationship of a competitor. *Barq's, Inc. v. Barq's Beverages, Inc.,* 677 F.Supp. 449, 451 (E.D.La. 1987). The sham exception is only for those who seek access for the sole purpose of harassment or to obstruct others from seeking relief.

The doctrine was established as a defense to antitrust claims. Beech argues that the *Noerr-Pennington* doctrine has been extended beyond antitrust issues. Beech claims that *Brownsville Golden Age Nursing Home, Inc. v. Wells,* 839 F.2d 155, 160 (3d Cir. 1988) applied the *Noerr-Pennington* doctrine in an action based in tort liability. Brownsville nursing home brought the action alleging civil conspiracy and tortious interference with business relations. The *Brownsville* Court applied the rule that "liability cannot be imposed for damage caused by inducing legislative, administrative, or judicial action...." *Id.*

The Court held that actions raising the concern and attention of state and federal authorities cannot be the basis for tort liability. *Id.*

Upon consideration of extensive pleadings and having heard oral argument, it appears that Beech's actions fit within the *Noerr-Pennington* doctrine. Thus are protected and cannot be the basis for tort liability. Accordingly, Beech's Motion for Summary Judgment on Count II shall be granted.

III. Count III

Count III states a claim for misappropriation of Plaintiff's property right. Plaintiff contends that a property right exists in the Service Bulletin.

Defendant Pratt moves for summary judgment on Plaintiff's misappropriation count alleging that Plaintiff has failed to plead properly the elements of misappropriation. Pratt claims that Plaintiff has not demonstrated that a property right existed in the Service Bulletin. It is further alleged that Plaintiff has failed to show actual conversion of the property for personal use.

In response, Plaintiff declares that the Service Bulletin was bargained for consideration in the Settlement Agreement. By reaching an accord in the Settlement Agreement, Plaintiff gave up his right in the underlying civil litigation.

Pennsylvania law does not clearly spell out the requirements for misappropriation of property rights. However from the various other misappropriation cases, this court deduces that misappropriation occurs when a property right belonging to one person is used to the benefit another. *See Macbeth-Evans Glass Co. v. Schnelbach, et al.*, 239 Pa 76, 86 A. 688 (1913), *see also Miracle Industries, Inc. v. Getty Petroleum Corp.*, No. CIV A. 90-4238, 1992 WL 121723 (E. D. Pa. May 20, 1992) .

The critical question in this issue is whether the issuance of the service bulletin can be construed as a property right belonging to Macario?

The term property has been defined by courts on a case by case basis. In *Stafford, et al. v. United States*, 435 F.2d 1036 (M.D. Ga 1977), the Court stated that "[P]roperty can be real, personal, tangible or intangible, and a person has a property

right in something if he has the right to possess it, use it and dispose of it." *Id* at 1038. In this case Macario possessed a commitment from Pratt for the issuance of the Service Bulletin pertaining to P-3 filters "as soon as practical". However, the issuance of the Service Bulletin was in the ultimate control of the FAA. As previously stated, the FAA has ruled that the Service Bulletin could not be issued.

The Plaintiff cannot claim that he has been deprived of a property right without first establishing that he has a right to that property. It has already been established that it is the FAA which makes final determinations as to the issuance of service bulletins. Neither this court nor the parties to the contract can stand in the shoes of the FAA. The FAA has made a ruling on the issuance of the Service Bulletin. Plaintiff does not possess a right in the issuance of the Service Bulletin. A right to the bulletin could only be establish upon the approval by the FAA. Because Plaintiff has no property right in the Service Bulletin, its misappropriation claim must fail. Summary judgment in Count III shall be granted in favor of Defendants Pratt and Beech.

IV. Counts IV & V

Defendants Pratt and Beech move for Summary Judgment on Counts IV & V, civil conspiracy and tort of concerted action. Plaintiff contests that Pratt and Beech entered into a joint defense agreement in *Macario I* and *Sunbird.* Plaintiff also alleges that Beech's counsel assisted Pratt's counsel during the *Macario I* trial. Pratt allege that the communications are protected by the First Amendment and preempted by federal law, regulation and policy.

Beech moves for summary judgment on the civil conspiracy count alleging that they had no prior knowledge of the settlement between Pratt and Macario. Beech asserts that its actions were justified since the FAA has proposed action upholding their position that the installation of the filters is a safety hazard. In further support, Beech declares that Plaintiff has failed to produce any evidence of threats or coercion tactics in attempt to influence Pratt to take action favorable to Beech.

Plaintiff failed to establish in both its briefs and oral argument specific facts detailing the conspiracy between Pratt and Beech that allegedly existed prior to the settlement agreement. During oral argument, the court requested Macario to submit evidence of the contents of a telephone conversation, or conversations establishing the existence of a conspiracy between the parties. Instead, Plaintiff attempted to establish the conspiracy from circumstantial evidence.

Due to the lack of specific facts as to the existence of a conspiracy, the court finds that a conspiracy did not exist. Accordingly, Defendants Motion for Summary Judgment on Counts IV & V shall be granted.

V. Count VI

Count VI of the Second Amended Complaint alleges that Defendants have been unjustly enriched by avoiding the jury verdict and the subsequent estoppel effect the verdict would have had on the *Sunbird* litigation. Plaintiff proclaims entitlement to the amount by which the defendants have been unjustly enriched.

Pratt claims that under Pennsylvania law unjust enrichment is a quasi-contractual remedy. The doctrine of unjust enrichment is inapplicable where a written or express contract exists between the parties. Pratt allege that any obligations owed by them to the Plaintiff exist as the result of the settlement agreement.

Plaintiff admits that unjust enrichment is usually unavailable where a written or express agreement exists between the parties. However, Plaintiff contests that where a contract is found to be unenforceable, unjust enrichment is an available remedy.

Under Pennsylvania law, "the quasi-contractual doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded on a written agreement or express contract." *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987); *quoting Benefit Trust Life Ins. Co. v. Union Nat. Bank*, 776 F.2d 1174 (3d Cir. 1985). Where an express contract exists between the parties, a party's recovery is

limited to the terms of the agreement. *Id.* In certain circumstances where a contract is found to be unenforceable, a party may succeed on a claim of unjust enrichment. *Shulman v. Continental Bank,* 513 F.Supp. 979, 986 (E.D.Pa. 1981). To recover under a theory of unjust enrichment, it is necessary to demonstrate that defendant was unjustly enriched at plaintiff's expense, and that the situation exists so as to require the recipient of the benefit to make restitution. *Sachs v. Continental Oil Co.,* 454 F.Supp. 614, 619 (E.D.Pa. 1978). Defendant must also be on notice that the party performing the service expected to be paid. *Id* at 20.

Plaintiff admits to a contractual relationship with Pratt defined by the provisions of the settlement agreement. However, Plaintiff contends that the settlement agreement is unenforceable entitling Plaintiff to restitution. *See Shulman v. Continental Bank,* supra at 986; *see also, Sachs v. Continental Oil Co.,* supra at 619.

This court finds no basis for recovery pursuant to the quasi-contractual theory of unjust enrichment. The facts in this case establish that a valid contract existed between the parties. The reality that a term of the contract could not be performed does not render the contract unenforceable. The Settlement Agreement exists and is enforceable to the extent the FAA's Airworthiness Directive permits. Therefore the quasi-contractual theory of unjust enrichment is inapplicable. The court shall grant summary judgment on Count VI in favor of Defendants Pratt and Beech.

VII. Count VII

Count VII alleges that Defendants have committed fraud in the inducement of the Settlement Agreement. Pratt assert that Plaintiff cannot support this claim through law or fact. Pratt declare that since the settlement agreement has not been breached, no claim of fraud in the inducement can be maintained. In addition, Pratt notes that Plaintiff has failed to plead fraud by "clear, precise, and convincing evidence". Furthermore, Pratt asserts that no monetary damages can be set forth as a resalt of the delay or non-issuance of the service bulletin.

Hence, Plaintiff has no compensatory damages, imagined benefits are not legally permissible.

Finally, Pratt in their reply memorandum profess that Plaintiff is prohibited from recovery in so forth that Pennsylvania law requires the return of proceeds of a settlement prior to proceeding on an action for fraud in the inducement of that settlement. In support, Pratt cites the recent decision in *Dempsey v. Associated Aviation Underwriters,* 141 F.R.D. 248 (E.D.Pa. 1992), *aff'd,* 977 F.2d 567 (3d Cir. Sept 30, 1992), in which the Court granted defendant Cessna's motion to dismiss the fraud in the inducement claim on the grounds that Plaintiff had failed to return the settlement proceeds. Under the rule a party has two choices upon discovering fraud in the execution of a release, either return the consideration and disaffirm the release or affirm the agreement and ignore the fraud. *Id.: see Nocito v. Lanuitti,* 402 Pa. 288, 167 A.2d 262 (1961).

Plaintiff has failed to return the proceeds from the settlement, therefore an action in fraud may not be instituted. However, Plaintiff denies that they must return the proceeds of the settlement agreement before maintaining an action in fraud. Plaintiff draws the courts attention to a more recent decisions in the Pennsylvania Superior Court, *Briggs v. Erie Insurance Group,* 406 Pa. Super. 560, 594 A.2d 761 (1991). Plaintiff declares that this court should be applying the holding set forth by the *Briggs* Court. The *Briggs* court held that Plaintiff's were not required to return the proceeds of the settlement agreement because Plaintiff's were not seeking rescission of the settlement agreement, but were asserting damage claims based on the insurers fraud during the settlement proceedings. *Id* 594 A.2d at 763.

Under *Erie Railroad Co. v. Tompkins,* this court is bound to apply the law as interpreted by the Pennsylvania Supreme Court. The holdings of an intermediate appellate court do not override authority set out by the Supreme Court of Pennsylvania. *Dempsey,* supra, at 250. Pennsylvania encourages the enforcement of civil settlements. *Dempsey* at 249. There is no indication that the policy favoring settlements has been set aside by the Pennsylvania Supreme Court. *Id.*

The leading authority in this matter was set out by the Court in *Nocito v. Lanuitti,* supra. The *Nocito* Court held that "a party who executes a release allegedly procured by fraud, may, upon discovering the fraud, either disaffirm the release and return the consideration, or affirm the voidable contract and waive the fraud." *Dempsey,* at 249; *Nocito v. Lanuitti,* 402 Pa. at 289, 167 A.2d at 262.

Plaintiff declares that the holdings set forth in *Nocito* and followed by *Dempsey* are inapplicable in the present situation. Plaintiff suggests that the under these holdings a party to a settlement agreement is simply precluded from suing for a greater amount than originally issued under the terms of the agreement, Plaintiff claims that where a party had no intent of complying with the settlement agreement, the contract does not have to be rescinded prior to entertaining a suit for fraud. Plaintiff states that the party may either disaffirm the agreement in a suit for recision or affirm the agreement and bring a suit for damages. *See Associated Hardware Supply Co. v. Big Wheel Distributing Company,* 355 F.2d 114 (3d Cir. 1966).

This court will uphold the law set forth by the *Nocito* court. Plaintiff has not returned the proceeds from the Settlement Aqreement, therefore an action in fraud in the inducement may not be asserted. Pratt's Motion for Summary, Judgment on Count VII shall be granted.

As far as the action maintained against Beech for fraud in the inducement, Plaintiff has failed to delineate, in the numerous pleadings and oral argument, any specific evidence of Beech's influence over Pratt in negotiating the terms of the Settlement Agreement. Accordingly, the court shall grant Beech's motion for summary judgment on the fraud in the inducement claim. Summary Judgment shall be granted in favor of Defendants on Count VII.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

T. MICHAEL MACARIO, III, *ADMINISTRATOR* of the Estate of Matthew Macario, Deceased, *Plaintiff,*	:	CIVIL ACTION
v.	:	
PRATT & WHITNEY CANADA, INC. and BEECH AIRCRAFT CORP., *Defendants.*	:	NO. 90-3906

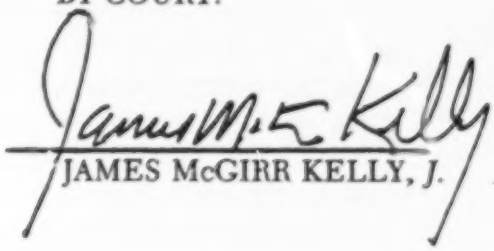
ORDER

AND NOW, this 11th day of February, 1993, in consideration of Defendant Pratt & Whitney, Canada's Motion for Summary Judgment; Defendant Beech's Motion for Summary Judgment; Beech's Supplemental Memorandum in Support of the Motion for Summary Judgment; Beech's Reply thereto; Pratt & Whitney's Supplemental Memorandum; Pratt & Whitney's Reply Memorandum in Further Support; Plaintiff's Memorandum in Opposition to Defendant's Motions; Oral Argument; Beech's Rebuttal Argument; Pratt's Rebuttal Argument; Plaintiff's Supplemental Memorandum in Opposition; and the foregoing Memorandum of Law; it is hereby ORDERED that:

(1) Summary Judgment is GRANTED in favor of Defendant Pratt & Whitney Canada, Inc. and against Plaintiff T. Michael Macario, III, Administrator of the Estate of Matthew Macario, deceased.

(2) Summary Judgment is GRANTED in favor of Defendant Beech Aircraft Corporation and against Plaintiff T. Michael Macario, III, Administrator of the Estate of Matthew Macario, deceased.

BY COURT:



JAMES McGIRR KELLY, J.

ENTERED: 2/12/93
CLERK OF COURT

STATUTES AND RULES INVOLVED

Section 1305 of the Transportation Code provides, in pertinent part:

> (a) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation. . . .

49 U.S.C. App. § 1305(a).

Section 1506 of the Transportation Code provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506.

Rule 56 of the Federal Rules of Civil Procedure, as it existed at the time summary judgment was granted in this case, provides, in relevant part:

> (c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> . . . .
>
> (e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be

made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(c),(e).

93-1891

Supreme Court, U.S.
FILED
JUN 25 1994
OFFICE OF THE CLERK

No. 94-1566

IN THE

Supreme Court of the United States

October Term, 1993

T. MICHAEL MACARIO, III,

Petitioner

vs.

PRATT & WHITNEY CANADA, INC., ET AL.,

Respondents

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENT PRATT & WHITNEY CANADA, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 94-1566

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T. MICHAEL MACARIO, III,

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENT PRATT & WHITNEY CANADA, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

This is a diversity case about enforcing a settlement agreement under Pennsylvania law. Only state law claims are involved.

Matthew Macario died in a crash of a small plane manufactured by respondent Beech Aircraft Corporation. Petitioner T. Michael Macario, the executor of the Macario estate, sued Pratt & Whitney Canada, Inc., the manufacturer of the plane's engines, for Matthew's death.

On December 8, 1989, petitioner entered into a settlement agreement with Pratt & Whitney Canada. Pratt & Whitney Canada agreed to pay petitioner $6,000,000 and to re-issue a document called a service bulletin "as soon as practical."

The issuance of the service bulletin would not enrich the estate of Matthew Macario. Rather, the purpose of this provision was to make similar aircraft safer for other people. The district court and the court of appeals ruled that Pratt & Whitney Canada had complied fully with the settlement agreement:

- Pratt & Whitney Canada paid Macario the required $6 million;
- Pratt & Whitney Canada issued the required service bulletin for some Beechcraft planes as soon as the Federal Aviation Administration permitted Pratt & Whitney Canada to do so; and
- Pratt & Whitney Canada was legally discharged from its duty to issue the bulletin for the remaining planes when the FAA issued a directive that conflicted with the service bulletin.

The undisputed record before the district court showed that Pratt & Whitney Canada repeatedly sought clearance to issue the bulletin but that aviation regulators repeatedly denied Pratt's request. Once the regulators concluded that the bulletin could issue for some planes, Pratt & Whitney Canada issued it. After months of study, the FAA determined that installing the equipment recommended in the service bulletin on certain other planes caused safety problems. In light of that evidence, the FAA required aircraft owners to *remove* the equipment. After the FAA issued its directive, the district

court determined that Pratt & Whitney Canada had satisfied its contractual obligations and granted Pratt & Whitney Canada's motion for summary judgment. The Third Circuit unanimously affirmed. Petitioner's request for a rehearing en banc was denied.[1]

Pratt & Whitney Canada and petitioner entered into the settlement agreement on December 8, 1989. On December 14, 1989, six days after the settlement, Beech requested information about the service bulletin that Pratt & Whitney Canada had agreed to issue. In the following days, Beech wrote to Pratt & Whitney Canada and expressed safety concerns about installing the P3 filters on the Beech aircraft. Beech told Pratt & Whitney Canada that it had shared its concerns with the FAA and that further testing was necessary to determine whether installation of the P3 filter was appropriate. Beech fleshed out its safety concerns with affidavits from Beech engineers over the next months. These affidavits explained that addition of the P3 filters to the Beech aircraft would make the planes more difficult to fly, unsafe in some circumstances, and invalidate the planes' FAA certification. The FAA requested that both Beech and Pratt & Whitney Canada conduct additional tests to determine whether installation of the P3 filter could cause unsafe acceleration delays. In addition, the FAA asked Pratt & Whitney Canada to delay issuance of any service bulletin recommending installation of P3 filters until the safety of such installations could be determined.

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[1] Petitioner also filed a Rule 60 motion in the district court. That motion was denied. His appeal of the denial of the Rule 60 motion is pending before the Third Circuit.

Over the next year, various flight tests and engine tests were conducted. One set of tests showed that the acceleration problem did not occur on Model A100 King airplanes—the model that crashed leading to the underlying lawsuit. Pratt & Whitney Canada therefore asked the FAA for clearance to issue the revised service bulletin limited to A100 aircraft. The FAA granted the requested clearance, and Pratt & Whitney Canada issued the revised version of the service bulletin as an "Alert Service Bulletin," on conspicuous blue paper. The bulletin recommended urgent priority and included the language Pratt & Whitney Canada had agreed to include. Consistent with the Beech tests and the FAA's clearance, Pratt & Whitney Canada limited the bulletin's applicability to the model A100 King Air aircraft.

On the basis of the flight safety problems Beech's other tests had identified, however, the FAA proposed to issue an airworthiness directive requiring the removal of P3 filters from aircraft certified at low idle speeds (51% range). The FAA proposed the rule on the basis of its determination that:

> installation of a P3 filter on engine installations utilizing an inflight low idle in the 51% core rotational speed range, can increase engine acceleration time such that the aircraft balked landing performance required by Federal Aviation Regulation (FAR), part 23, Paragraphs 23.75(d), 23.77 and 23.143(a)(5), cannot be achieved.

56 Fed. Reg. 8733 (Mar. 1, 1991). The FAA issues airworthiness directives when it finds that "an unsafe condition exists in a product." 14 C.F.R. § 39.1 (1993). Failure to comply with an airworthiness directive results in grounding of the aircraft. 14 C.F.R. § 39.3 (1993) ("No

person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive."). Once the FAA announced its intention to require the removal of P3 filters, Pratt & Whitney Canada moved for a stay under the doctrine of primary jurisdiction. The district court granted Pratt & Whitney Canada's motion. Macario neither appealed that decision nor does he seek certiorari to review it.

On July 9, 1992, the FAA issued the airworthiness directive. The FAA's conclusion was clear: "After careful review of the data, including the [23] comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed." The FAA directed that all owners of certain model King Airs must "remove from service, if installed, the P3 filter assembly." The filters were to be removed "to prevent excessive engine acceleration time that could result in an aircraft's' inability to safely perform the balked landing maneuver required by Federal Aviation Regulations." 57 Fed. Reg. 31654 (July 17, 1992).

After the FAA issued the airworthiness directive, Pratt & Whitney Canada moved for summary judgment. The district court granted the motion on February 12, 1993. Pet. App. A-19. The Third Circuit unanimously affirmed that determination on January 28, 1994. Pet. App. A-2. Macario's petition for en banc review of the decision was denied on February 25, 1994. Pet. App. A-1.

Summary of Argument

Macario raises three issues in his petition. First, Macario argues that the Third Circuit was wrong to affirm the district court's decision granting summary judgment.

This issue is not one of federal importance. The record shows that the district court applied the settled test for summary judgment and made a reasoned decision that has overwhelming legal and evidentiary support. The Third Circuit applied the settled standard for appellate review and properly affirmed.

Macario next asks this Court to review an issue that was not addressed below: whether federal law preempts certain aspects of state common law where aviation is involved. There is no reason for the Court to consider this issue. First, contrary to Macario's argument, neither the district court nor the court of appeals relied on preemption law in ruling against Macario. Neither court cited any of the preemption cases Macario cites in his petition. In fact, neither court's opinion even *mentions* the word "preemption." If the Court desires to address the preemption issue, it should do so with the benefit of a lower court opinion based on it. Second, even were the Court inclined to consider preemption in a case where it has not been addressed, petitioner has not offered any reason to do so now. Macario's own authority indicates that there is no split among the circuits on the issue.

Macario's third issue concerns the doctrine announced by this Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Macario claims that there are questions surrounding the extension of this doctrine in cases outside the antitrust context. Petitioner is wrong. The lower courts are in agreement that the doctrine is not limited to antitrust cases. Again, there is no reason for this Court to grant certiorari to consider the issue.

Reasons for Denying the Writ

I. Summary Judgment Was Properly Granted and Properly Affirmed

In his first argument, petitioner asserts that the district court mishandled summary judgment (either because the court misapplied the holdings of this Court or because the Court's opinions regarding summary judgment are not clear enough) and that the court of appeals mishandled the appeal (again, either because it did not engage in a proper review or because this Court's opinion regarding appellate review are not clear enough). The entire first section—stripped of the attempts to create a federal issue where there is not one—simply asks this Court to exercise an independent review of summary judgment in this case.

Despite petitioner's suggestions to the contrary, there is no legitimate dispute that the district court applied the proper standards for summary judgment. The district court stated that summary judgment shall be issued if the evidence shows that " 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " Pet. App. A-6 (*quoting* Fed. R. Civ. P. 56(c)). The district court relied upon the two leading opinions of this Court, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986), in its application of that rule. Pet. App. A-7, A-8. Similarly, the Third Circuit applied the proper standard for appellate review, which neither party disputed was *de novo* review.[2] Macario's

[2] Petitioner's only "evidence" that the standard of review was improper is the Third's Circuit's decision on the merits. *See* Pet. 8 ("Had the court of appeals discharged its duty of responsible appellate review, it would not have, nor could it have, wholeheartedly

entire first argument, therefore, turns on whether or not the evidence supports summary judgment in this case. It does.

Macario points to one supposedly disputed issue of fact that the district court got wrong. Where the district court wrote "Pratt and Beech conducted flight tests," it should have written "Beech conducted flight tests and Pratt conducted engine tests." *See* Pet. 8. According to Macario, the district court's use of the incorrect language means it impermissibly—or incorrectly—decided an issue of fact on summary judgment. And the failure to correct that error on appeal, argues Macario, shows that the court of appeals did not conduct *de novo* review.

Macario's arguments are wrong. As he did in the court of appeals, Macario simply ignores the express reasons the district court articulated when it granted Pratt & Whitney Canada's motion. Counts III, IV, V, VI, and VII were all dismissed because there was no evidentiary or legal support for them.[3] The conduct of flight tests by

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embraced the district court's erroneous factual findings and misapplication of the law.")

[3] The district court granted summary judgment on Count III (misappropriation) because it found Macario's interest in the service bulletin was not property. Pet. App. A-13. The Third Circuit affirmed on the same basis. Pet. App. A-3. The district court granted summary judgment on Count IV (conspiracy) and Count V (concerted action) because petitioner failed to identify any evidence of a conspiracy. Pet. App. A-14. The Third Circuit affirmed on the same basis. Pet. App. A-3. The district court granted summary judgment on Count VI (unjust enrichment) because, under Pennsylvania law, "the quasi-contractual doctrine of unjust enrichment [is] inapplicable when the relationship between the parties is founded on a written agreement or express contract." Pet. App. A-4 (*citing Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987)). Again, the Third

either respondent is completely irrelevant to the validity of those affirmative defenses.

A similar analysis applies to Count I—the breach of contract claim. The district court granted summary judgment in favor of Pratt & Whitney Canada on Count I on the basis of the affirmative defenses the company raised. In particular, the district court concluded that Pratt & Whitney Canada had complied with the express language of the settlement agreement. Pet. App. A-9. The terms of the settlement, proposed by petitioner's counsel himself, provide for issuance of the bulletin "as soon as practical," not "immediately" or "under any circumstances." Pet. App. A-6. The court below concluded unambiguously "that under the circumstances Pratt has complied with the terms of the settlement agreement." Pet. App. A-9. The undisputed facts demonstrate that, before Pratt & Whitney Canada could issue the bulletin, an increasing level of evidence demonstrated that placing P3 filters on the engines of some low-idle Beech

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Circuit affirmed for the same reason and citing the same case. Pet. App. A-14. Finally, the district court granted summary judgment on Count VII (fraudulent inducement) because Macario made no effort whatsoever to identify any evidence showing he is entitled to damages, "an essential ingredient of a cause of action based on fraud" in the Third Circuit. *Kaufman v. Mellon Nat'l Bank and Trust Co.*, 366 F.2d 326, 331 (3d Cir. 1966) (*citing Tilghman v. Dollenberg*, 418 Pa. 604, 213 A.2d 324, 326 (1965)). The district court also granted summary judgment on Count VII because Pennsylvania law requires the return of the proceeds of a settlement as a necessary condition for maintaining a fraud action stemming from a settlement. Pet. App. A-16 to A-17 (*citing Nocito v. Lanuitti*, 402 Pa. 288, 167 A.2d 262 (1961); *and Dempsey v. Associated Aviation Underwriters*, 141 F.R.D. 248 (E.D. Pa.), *aff'd mem.*, 977 F.2d 567 (3d Cir. 1992)); *see also Melendez v. Horizon Cellular Tel. Co.*, 841 F. Supp. 687, 692 (E.D. Pa. 1994).

aircraft could cause safety problems. When the FAA issued its directive and ordered that P3 filters be removed, it became "impractical" for Pratt & Whitney Canada to issue a bulletin that required that the P3 filters be installed. Under the circumstances, the district court concluded that Pratt & Whitney Canada's promise to issue the bulletin "as soon as practical" had been met. The Third Circuit unanimously reached the same conclusion. Pet. App. A-3.[4]

As a factual matter, the FAA has found that installation of P3 filters as recommended in the service bulletin could cause unacceptable operating characteristics in certain aircraft. Under the doctrine of primary jurisdiction, the lower courts decided to respect the FAA's factual judgment about the effects of P3 filters, as that judgment reflects the special technical expertise and discretion of the FAA in its regulatory field. *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959).

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[4] Even if plaintiff had not stated that the service bulletin only had to be issued "as soon as practical," Pratt & Whitney Canada would still be excused from performance because impracticality of performance is a defense to a contract action under Pennsylvania law. *See Lichtenfels v. Bridgeview Coal Co.*, 366 Pa. Super. 304, 531 A.2d 22, 26 (1987), *appeal denied*, 517 Pa. 631, 539 A.2d 811 (1988). That is precisely what the FAA concluded. The legal defense of impracticality has also been recognized when "legislative bodies, in exercising their independent judgment," take some action that prevents or interferes with performance. *Philadelphia Fed'n of Teachers v. Thomas*, 62 Pa. Commw. 286, 436 A.2d 1228 (1981). The absence of legislative action interfering with contractual performance is an implied condition, the failure of which excuses nonperformance. *Philadelphia Fed'n*, 436 A.2d at 1233. That condition undisputedly failed in this case. Performance of the agreement is, therefore, impractical.

Macario attacks this conclusion by arguing "[t]here are a number of things PWC could have done to obtain full FAA approval for the revised service bulletin." Pet. 10. He argues that affidavits he filed in support of his position, for instance, include comments that the tests the FAA relied upon were flawed and that proper tests would have demonstrated that the service bulletin could issue. Pet. 10. Even assuming Macario is correct, however, an argument before a jury (or the Third Circuit or this Court) is not the proper avenue for review of the FAA's decision. *See* 49 U.S.C. app. § 1486 (1988) (FAA orders "subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia"); *United States v. Hayes*, 264 F.2d 929, 930 (2d Cir. 1959) ("If Hayes wished to challenge the Airworthiness Directive . . . he could have sought judicial review under 49 U.S.C.A. [App.] § [1486]."). Having failed to properly challenge the FAA's decision, Macario must recognize its legal effect. The FAA has made a decision that installing the P3 filters on King Airs with low idle engines causes a safety problem. As the courts below recognized, the FAA's decision meant that Pratt & Whitney Canada was relieved of its obligation to issue a bulletin recommending that the filters be installed.

Even if the FAA had not settled the issue, summary judgment was still proper because Macario offered no proof that he suffered any damages. The district court found Macario's damages theories "arbitrary" and "unsupported." Pet. App. A-9. The Third Circuit reached the same conclusion. Pet. App. A-4 ("Macario has failed to adequately demonstrate any measurable damages"). The lower courts reached this conclusion because there was no evidence of measurable damages at all; there

was only the argument of Macario's counsel. And the arguments did not come close to the standard of "reasonable certainty" for damages that Pennsylvania law requires. *Hood v. Meininger*, 377 Pa. 342, 348-49, 105 A.2d 126, 129 (1954) ("it is settled that damages for breach of contract cannot be recovered unless the evidence affords sufficient basis for estimating them with reasonable certainty"); *see also, e.g., Carpel* v. *Saget Studios, Inc.*, 326 F. Supp. 1331 (E.D. Pa. 1971); *Aiken Indus., Inc. v. Estate of Wilson*, 477 Pa. 34, 383 A.2d 808, 812 (1978), *cert. denied*, 439 U.S. 877 (1978).

Petitioner fails to explain in his petition how the application of a different standard for summary judgment or appellate review would change any of the decisions reached by the courts below. He fails to explain how any disputed material fact would change any of the lower courts' decisions. He completely fails to explain why this Court should grant certiorari to consider the issues. His petition should be denied.

II. This Is Not a Preemption Case

As explained above, Macario ignores the district court's detailed analysis regarding the reasons that summary judgment issued for each of his claims. Rather than attack the actual basis of the district court's decision, Macario asserts that the district court's decision was based on the doctrine of preemption, not on the validity Pratt & Whitney Canada's affirmative defenses. *See* Pet. 7, 11-15. He asserts that the court of appeals implicitly rested its decision on the same basis.

In fact, neither the district court nor the court of appeals relied on the doctrine of preemption, in essence

or otherwise. Neither opinion even mentions the word. Review of the real reasons summary judgment issued shows that preemption analysis was not involved. *See supra* footnote 3. Preemption analysis has nothing to do with any of those reasons. It has nothing to do with whether the service bulletin is property. It has nothing to do with whether evidence of a conspiracy or concerted action was presented. It has nothing to do with whether the underlying agreement was express or implied. It has nothing to do with petitioner's lack of evidence of damages. And it does not affect the affirmative defenses of legal impracticality or compliance with the express language of the settlement.

Petitioner's argument regarding preemption analysis is essentially a request for an advisory opinion from this Court and is wholly undeveloped by the opinions below.

III. The Lower Courts Properly Applied The Noerr-Pennington Doctrine

Macario finally suggests that this Court should grant the writ to review the application of the *Noerr-Pennington* doctrine outside the antitrust context. Pet. 16-17.[5] As he argued below, petitioner first suggests that

[5] As recognized by the district court below, the First Amendment guarantees appellees the right to communicate with the government without being sued for "fraud" or "conspiracy." More than thirty years ago, this Court explained that the First Amendment's right to "petition the government for redress of grievances" prevented an antitrust lawsuit against an industry group that had lobbied for a particular regulatory decision. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961); U.S. Const. Amend. I. The First Amendment's protection applied even though the publicity campaign launched by the industry was "aptly characterized" as involving "deception of the public, manu-

Noerr-Pennington might not apply outside the antitrust context. In a carefully-worded sentence, petitioner suggests that there is a circuit split on this issue. *See* Pet. 16-17 ("Some courts have expressly held that the [*Noerr-Pennington*] doctrine does not apply outside the antitrust context whereas others have cited its reasoning in cases other than antitrust cases without reaching this conclusion.") No such split exists. The very cases petitioner cites for the "split" say that *Noerr-Pennington* can be extended outside antitrust cases. *See, e.g., Hufsmith v. Weaver*, 817 F.2d 455, 458 (8th Cir. 1987) (cited by Macario) ("this court has long indicated that the doctrine may be so extended"); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (cited by Macario) (The circuits are in agreement that *Noerr-Pennington* extends beyond the narrow confines of antitrust cases. Refusing to allow action alleging civil conspiracy and tortious interference with business relations for "damage caused by inducing legislative, administrative, or judicial action."). In fact, this Court has adopted the reasoning of the *Noerr-Pennington* doctrine in construing the National Labor Relations Act. *See Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 741 (1983).

Recognizing that *Noerr-Pennington* does extend to the inducement of government action in this case, Macario next argues that Pratt & Whitney Canada's actions fall

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facture of bogus sources, [and] distortion of public sources of information." *Noerr*, 365 U.S. at 140. The Court held that the industry group could not be sued for an antitrust violation even though the "deceptive" campaign was designed to injure the group's competitors. *Noerr*, 365 U.S. at 129. The Court's decision was reenforced in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

within the "sham" exception to the *Noerr-Pennington* doctrine. Macario suggests that Beech used "improper means" to influence the FAA. The "sham" exception to the *Noerr-Pennington* doctrine, however, does not focus on the means used to achieve governmental action; it focuses instead on the end a party is attempting to achieve. As long as a party's actions are genuinely aimed at procuring favorable government action, the sham exception does not apply, even if the party attempts to achieve that end through improper means. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991) (A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" not one "who 'genuinely seeks to achieve his governmental result, but does so through improper means.' ") (*quoting Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 508 (1988)). As recently explained by this Court, the "sham" exception is construed narrowly. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920 (1993) (holding that plaintiffs pursuing a claim that litigation was a sham must demonstrate that the litigation was objectively baseless). There is no evidence that Pratt & Whitney Canada's actions were not genuinely aimed at procuring favorable governmental action. In fact, favorable governmental action took place. The sham exception does not apply.

Conclusion

For all the foregoing reasons, this Court should decline to grant petitioner's request for a writ of certiorari.

Respectfully submitted,

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No. 94-1566

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

T. Michael Macario, III,

Petitioner,

v.

Pratt & Whitney Canada, Inc., et al.,

Respondents.

Certificate of Service

I, David Berten, do hereby certify that copies of the BRIEF FOR RESPONDENT PRATT & WHITNEY CANADA, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI re the above captioned matter, have been served to each of the following on this 25th day of June, 1994.

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No. 93-1891

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

T. MICHAEL MACARIO, III,
Petitioner

v.

PRATT & WHITNEY CANADA, INC., et al.,
Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF OF RESPONDENT BEECH AIRCRAFT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether review should be denied because the decisions below do not create any conflict between federal courts of appeal on the same or similar issues, do not conflict with decisions of this Court, and do not present any important questions of federal law to be resolved.

2. Whether review should be denied because the decisions below, which recognize the primary jurisdiction of the FAA to decide what modifications can be made to existing airplanes, are in accordance with established federal law and no question of federal preemption is presented.

3. Whether review should be denied because the sole remedy available to a litigant dissatisfied with an airworthiness directive or other order issued by the FAA is by appeal of that order pursuant to 49 U.S.C. App. § 1486(a); petitioner failed to pursue such an appeal and cannot collaterally attack the FAA airworthiness directive in this action.

4. Whether review should be denied because the *Noerr-Pennington* doctrine, extending First Amendment protection to Beech's successful petition to the FAA for an airworthiness directive, was properly applied under the circumstances in this case.

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APPENDIX

Federal Aviation Administration Airworthiness Directive AD92-15-11, Docket No. 91-ANE-06 dated July 17, 1992 (57 Fed. Reg. 31654) A-1

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No. 93-1891

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

T. MICHAEL MACARIO, III,

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v.

PRATT & WHITNEY CANADA, INC., et al.,

Respondents

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF OF RESPONDENT BEECH AIRCRAFT CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Beech Aircraft Corporation[1], respectfully requests that this Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinions below are provided in the Appendix to Petition for Writ of Certiorari ("P-App.").

1. Beech Aircraft Corporation is a wholly owned subsidiary of Raytheon Corporation, a publicly owned corporation.

JURISDICTION

As set forth in the Petition for Writ of Certiorari, jurisdiction of this Court is evoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN THE PETITION FOR WRIT OF CERTIORARI

Section 1486 of the Federal Aviation Act, 49 U.S.C. App. § 1486.[2]

COUNTERSTATEMENT OF THE CASE

Factual Background

Beech Aircraft Corporation ("Beech") was sued because it exercised its constitutional right to petition the government for favorable action. To protect the owners of more than 4,000 Beech King Air airplanes and their passengers from being exposed to serious injury or

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2. 49 U.S.C. App. § 1486 provides, in pertinent part:

(a) **Orders subject to review; petition for review.** Any order, affirmative or negative, issued by the Board or Administrator [Secretary of Transportation] under this Act, except any order in respect to any foreign air carrier subject to the approval of the President as provided in section 801 of this Act shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

• • •

(d) **Power of court.** Upon transmittal of the petition to the Board or Administrator [Secretary of Transportation], the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator [Secretary of Transportation]. Upon good cause shown and after reasonable notice to the Board or Administrator [Secretary of Transportation], interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

death, and to protect itself from legal liability, Beech caused the Federal Aviation Administration ("FAA") to investigate the safety of the reissuance by Pratt & Whitney Canada, Inc. ("PWC") of a PWC Service Bulletin ("SB 1330"). Pursuant to SB 1330, PWC, as the engine manufacturer, would have urged owners of Beech King Airs equipped with PWC small gas turbine engines to install filters ("P3 filters") in the air lines which by pneumatic force control the rate at which fuel is delivered to the two turboprop PWC engines ("P3 lines").

It was in 1989 that PWC, an engine manufacturer, agreed to reissue SB 1330 pursuant to PWC's settlement of a claim which T. Michael Macario ("Macario") had asserted on behalf of the estate and heirs of a pilot killed in a King Air accident. (The original personal injury action is hereafter referred to as "*Macario I*.") However, the uncontradicted evidence in the district court established that Beech was not a party to the suit which PWC settled with Macario in 1989; had not been aware of, or participated in any way, in PWC's negotiations to settle that suit, and did not learn of the terms of that settlement until after the settlement was concluded.[3]

Beech engineers and test pilots had learned from performing flight tests in 1981 for the certification of one of the King Air models affected by SB 1330, that equipping King Airs powered by small turbine engines with these filters involved a risk to flight safety.[4] Beech

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3. While Macario had sued Beech in a companion action, that action was settled as to Beech before the first trial of *Macario I*, which ended in a hung jury as to the liability, if any, of PWC. It was during jury deliberations at the second trial of *Macario I* that PWC and Macario entered into the settlement agreement involved.

4. With the filters installed, the engines accelerated too slowly for the airplane to meet FAA requirements for balked landing performance, i.e., a maneuver in which the pilot must abort his landing and apply full power to the engines to execute a "go-around." If the delay in engine acceleration occurred 200 feet over a runway, it would be extremely difficult for a pilot of ordinary skill to regain full power before the airplane would impact the runway.

had also determined in 1981 that this risk was so substantial as to cause Beech to have that model King Air certificated for manufacture and operation without having such filters installed. The other model King Airs affected by SB 1330 had also been certificated by Beech without having P3 filters installed. Furthermore, neither Beech nor FAA records, over the course of more than twenty years, had recorded any King Air accidents attributable to the absence of P3 filters. On the other hand, as the FAA subsequently confirmed, there are FAA records which establish that build ups of contaminants in such filters do adversely affect the operation of the engines.

As soon as Beech learned what PWC proposed to do about reissuing SB 1330, Beech brought this existing information to the attention of the FAA. Beech requested that the FAA conduct an investigation to determine whether or not the installation of those filters would in fact create a risk to flight safety in the various Beech aircraft models involved.[5]

The FAA met with Beech and PWC, reviewed the documented basis for Beech's concerns, and determined that PWC had issued SB 1330 in its original form without consulting Beech or performing flight tests to determine the effect of the installation of such filters on the King Air models involved. Then, the FAA, and later its Canadian counterpart, acting at the instance of Beech alone, stayed PWC's reissuance of SB 1330 pending the FAA's completion of an investigation of the possible flight safety risks involved.

While that investigation was in progress, Macario's counsel instituted the present proceeding. PWC was

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5. The foregoing is what the documentary record clearly establishes was Beech's initial request of the FAA; there is no evidence whatsoever that Beech's original intention was, as alleged by Petitioner (Petition, at p. 10, fn. 3), "to make certain that the service bulletin was never [re]issued."

sued for breach of contract, Beech for tortious interference with contract, and both PWC and Beech on a multitude of other theories, most notably "civil conspiracy" and "concerted tortious action." The object of the suit was to force PWC to reissue SB 1330 in its original form, but on an "urgent compliance" basis, and to punish Beech for allegedly interfering improperly with Macario's settlement with PWC.[6]

The FAA continued its investigation, closely monitored and (through its own test pilot) actually participated in Beech flight tests which confirmed the existence of the potential safety of flight problem reported initially by Beech.

Not until FAA investigators had determined for themselves the validity of Beech's concerns, and its staff had decided to recommend issuance of the Airworthiness Directive ultimately issued, did PWC corroborate or support Beech's expressions of concern. Only after PWC engineering representatives met with Beech engineers at the FAA's direction to clarify their apparent differences, did PWC acknowledge the validity of Beech's concern.

Ultimately, after considering as well test data, letters and affidavits from experts who expressed contrary opinions submitted by Macario's counsel, the FAA caused PWC to limit the application of the reissued SB 1330 to only two King Air models.[7] The FAA issued an

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6. Although Macario contends (Petition, at p. 3) that the motivation for the alleged conspiracy was to avoid the "preclusive effect" that a verdict in *Macario I* would have in the *Sunbird* litigation, Macario ignores the fact that a verdict adverse to PWC in the *Macario I* case would not have been binding on Beech in *Sunbird* because Beech was not a party to *Macario I* nor otherwise a privy to its disposition. Moreover as to Macario's contention (Petition, at p. 5) that Beech had a "substantial financial exposure" in the *Sunbird* litigation, that litigation was resolved, and not as a class action, with no payment whatever by Beech.

7. The Beech King Air models F90 and A100 (the airplane piloted by Macario had been an A100) were not included by the FAA because those airplanes were certified for flight with engine ground

Airworthiness Directive[8] which required owners of all of the other King Air models affected by SB 1330 in its original form to remove any filters which might have been installed pursuant to the original, entirely optional, bulletin.[9]

The FAA took this action because it determined that an unsafe condition existed. The installation of P3 filters did cause excessive engine acceleration times which could result in the inability of a pilot to safely perform the balked landing maneuver, i.e., where the pilot must abort the landing, accelerate the engines to full power and execute a "go-around." The FAA specifically considered and rejected each and every contention of Macario's counsel and his experts. The FAA found that Beech's flight tests, conducted at the FAA's request, were properly conducted in a conservative manner to determine the "worst case" effect that a P3 filter would have. The FAA also found that flight tests conducted by Macario's counsel and his experts without FAA supervision or participation were invalid and that the tests were

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idle speeds set at 62% or higher because of their specific propeller installations (four bladed propellers, rather than three bladed propellers as on the other models).

8. The Airworthiness Directive AD 92-15-11, Docket No. 91-ANE-06, was published in the Federal Register on July 17, 1992. 57 Fed. Reg. 31654. A copy of the Airworthiness Directive and the Supplementary Information published with it are set forth as Appendix A to this Brief ("R-App. A").

9. Although Macario states (Petition, at p. 4) that the Notice of Proposed Rulemaking, published by the FAA proposing the Airworthiness Directive, did not include airplanes of other manufacturers equipped with PWC engines, Macario neglects to inform the Court that in the Supplementary Information published in the Federal Register with the final Airworthiness Directive, the FAA stated that the FAA agreed that other model airplanes were potentially affected and identified one additional model series of another manufacturer that was directly affected. The FAA further stated that it was evaluating flight test results and that additional rulemaking might follow. (R-App. A-5)

conducted improperly, without known fuel control calibration, and with poor control over the test conditions.[10]

Macario failed to exercise his exclusive remedy to seek review of the FAA's action by petitioning the court of appeals as provided by § 1486(a) of the Federal Aviation Act, 49 U.S.C. App. § 1486(a). Thereafter, the district court entered summary judgment in favor of Beech.

The Decisions of the District Court and the Court of Appeals

Beech's motion for summary judgment was based on a detailed deposition and documentary record with respect to the 1981 Beech flight tests and their results; detailed correspondence with and from the FAA regarding the reissuance of SB 1330; deposition testimony and records of the 1990 Beech flight tests conducted with the FAA as part of the FAA's investigation; deposition excerpts from the FAA witnesses as to the reasons for the FAA's actions, the validity of the Beech flight test parameters and data and the invalidity of experimental flight test data submitted by Macario's counsel here; deposition excerpts from PWC's personnel and its counsel regarding the settlement establishing that Beech was not consulted by PWC before or during the settlement negotiations with Macario, and affidavits from Beech's counsel establishing that Beech was not even aware of the settlement until after it occurred.[11]

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10. Macario contends (Petition, at p. 5) that the engine fuel control settings used by Beech would make the engine uncertifiable. However, the FAA also determined that Beech's use of a ground or in-flight idle of 51% was approved in accordance with the limitations imposed by the engine manufacturer, PWC. (R-App. A-5)

11. Contrary to Macario's assertion (Petition, at p. 10, fn. 3), it was Beech who provided the district court with documentary evidence of Beech's contacts with the FAA regarding the proposed reissuance of SB 1330.

The very experienced district judge did not grant summary judgment in favor of Beech and PWC until he had reviewed the lengthy briefs, the detailed documentary record and listened to oral arguments with respect to the alleged merits of Macario's multifarious contentions. In fact, at oral argument, the district judge asked Macario's counsel to submit evidence establishing the existence of any conspiracy between Beech and PWC (P-App. A-14), and granted him additional time for such a submission. Macario failed to produce any such evidence and the district court properly granted summary judgment on Macario's civil conspiracy and concerted action claims (P-App. A-14).

As to Macario's claim for fraud in the inducement, the district court properly found that, once again, Macario had failed to produce evidence that Beech had influenced PWC in negotiating the terms of the settlement agreement (P-App. A-17).

As to Macario's claim that Beech tortiously interfered with Macario's contractual relationship with PWC, the district court concluded that Beech did no more than exercise its constitutional right to petition the government (i.e., the FAA) and, thus, Beech's actions were protected under the *Noerr-Pennington* doctrine and could not be the basis for tort liability (P-App. A-12).

As to Macario's claim for unjust enrichment, the district court properly held that that doctrine did not apply where the relationship between the parties (Macario and PWC) was founded on a written agreement or express contract (P-App. A-15).

As to Macario's claim for misappropriation of a property right, the district court properly held that any right which Macario might otherwise have had to the reissuance of SB 1330 was subject to the power of the FAA to authorize or prohibit such action, and that because the FAA had determined that SB 1330 should not be issued in its original form, Macario had no property right in SB 1330 (P-App. A-13).

The court of appeals affirmed the district court's decision, holding that:

> We have carefully considered all of the issues and arguments raised by Macario, and we find that the district court's judgment is correct in all respects.

(P-App. A-4).[12]

REASONS FOR DENYING THE WRIT

Rule 10 of this Court provides:

> A review on Writ of Certiorari is not a matter of right, but of judicial discretion. A Petition for Writ of Certiorari will be granted only when there are special and important reasons therefor.

The Rule goes on to describe "the character of the reasons" the Court will consider in passing on a Petition for Certiorari, such as: (1) conflicts between federal courts of appeal on the same issue; (2) wide departures by a federal court of appeals from the "accepted and usual course of judicial proceedings"; and (3) a decision by a federal court of appeals on an important question of federal law which has not been, but should be, settled by this Court, or which "has decided a federal question in a way in conflict with applicable decisions of this Court."

When measured by the foregoing standards, the defects of the present Petition are both clear and fatal. The decisions below do not conflict with any decisions of this Court, do not create any conflict between courts of appeal on the same or similar issues, and do not present any important questions of federal law to be resolved by this Court.

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12. Contrary to Macario's contentions (Petition, at p. 6), the court of appeals did not base its affirmance of the summary judgment in favor of Beech on plaintiff's civil conspiracy and tort of concerted action counts solely on first amendment grounds. The court also concluded that ". . . the district court properly determined that insufficient evidence exists in the record to establish a genuine issue of material fact concerning wrongful activity on the part of Pratt or Beech." (P-App. A-3).

I. Summary Judgment Was Properly Entered And Affirmed In Accordance With The Applicable Decisions Of This Court.

The district court properly set forth the applicable standards for deciding a motion for summary judgment, (P-App. A-6-7) citing this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). More specifically, the district court held:

> Therefore, the party opposing the motion must come forward with "more than a mere scintilla of evidence in its favor" and ' "cannot simply reassert factually unsupported allegations contained in its pleading.' " *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (citing *Anderson*, 477 U.S. at 249, 325).

(P-App. A-7).

Despite Macario's protestations to the contrary, that is exactly what he attempted to do in this case. Macario failed to produce any evidence contradicting the deposition testimony and the affidavits submitted by Beech which conclusively established that Beech was not consulted about and had no knowledge of the *Macario I* settlement. Macario also failed to produce any evidence of a conspiracy or concerted action by PWC and Beech.

Neither the district court nor the court of appeals decided any issues of fact in granting summary judgment in favor of Beech. The FAA determined that P3 filters should not be installed on certain Beech King Airs, and Macario never challenged the FAA's action. The Airworthiness Directive established that Beech had done nothing more than lawfully exercise its constitutional right to be heard on an issue of obvious concern for the welfare of Beech and its customers.

Macario contends (Petition, at p. 8) that PWC could have taken action to allow the Airworthiness Directive to be amended to include the filter, and Macario also

claims (Petition, at p. 10) that Beech did not submit any affidavits from its engineers or test pilots regarding the alleged actions that PWC could have taken to obtain an amendment of the Airworthiness Directive from the FAA.[13] Such arguments are specious. Beech objected to SB 1330 as originally proposed, not after some potential future modifications to the PWC engines or Beech King Airs. The salient fact is that the FAA issued an Airworthiness Directive requiring the removal of P3 filters on those Beech King Airs covered by the Airworthiness Directive.

Macario contends that review by the Court is necessary to resolve questions left open by *Anderson* and cites the dissenting opinions of Justices Brennan and Renquist. However, the present case does not involve any complicated evidentiary standards nor does it present any difficulty in applying the Court's decision in *Anderson* to the facts of this case. Here, quite simply, Macario failed to produce any evidence of fraud, conspiracy or concerted action on the part of Beech.

Celotex Corp. v. Catrett, *supra*, does not support Macario's position. There, this Court held that F.R.C.P. 56 does not require the moving party to support its motion for summary judgment with affidavits or other similar materials "negating the opponent's claim."

Finally, Macario argues (Petition, at p. 11) that the court of appeals "abdicated its duty of responsible appellate review," contending that the court of appeals granted some "deference" to the district court's decision granting summary judgment. The court of appeals' opinion states that the court carefully considered all of

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13. Macario fails to consider the fact that any change in the flight idle of the King Air airplanes would require extensive flight testing and modification of other significant flight limitations, including stall speed. Such a change would also require a re-certification by the FAA, and, in certain significant respects, the issuance of new flight instructions to the owners of more than 4,000 existing aircraft. The FAA has concluded that no justification exists for requiring such changes.

the issues and arguments raised by Macario. There is no indication that the court of appeals did not apply the correct standard of review, i.e., a plenary review. Macario's reliance on *Salve Regina College v. Russell*, 499 U.S. 225 (1991) is misplaced. There, the Court held that the court of appeals committed reversible error when it applied "appellate deference" to an interpretation of state law made by the district judge sitting in that state, and that a court of appeals must review a district court's determination of state law *de novo*.

Here, no deference to the decision of the district court as such was extended. Summary judgment was properly entered by the district court and affirmed by the court of appeals in accordance with the prior decisions of this Court.

II. The Decisions Below Which Recognize The Primary Jurisdiction Of The FAA Are In Accordance With Established Federal Law And No Question Of Federal Preemption Is Presented.

Neither the district court nor the court of appeals held that Macario's claims were preempted by federal law. Their decisions do not even mention federal preemption. The district court did recognize the doctrine of primary jurisdiction, holding that "[w]hile the court is proficient in many areas, it preserves matters of safety in aviation to the expertise of the FAA" (P-App. A-8).

Primary jurisdiction applies whenever enforcement of a claim involves the resolution of technical issues which have been committed by Congress to the expertise of a regulatory body. *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64 (1956). In *Far East Conference v. United States*, 342 U.S. 570 (1952), this Court stated, it is:

> . . . now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for

> regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined.

Id. at 574.

Here, the district court properly concluded that the FAA should first decide the technical safety issues involved in the application of P3 filters.[14] The FAA did so and issued its Airworthiness Directive. An airworthiness directive has the force of law. *Crigler v. Cessna Aircraft Co.*, 830 F.2d 169 (11th Cir. 1987). Once the Airworthiness Directive was issued, the courts below properly held that the Airworthiness Directive established PWC's state law affirmative defenses to Macario's contract claim, and established that Macario had no property interest in the reissuance of SB 1330.

Neither the district court nor the court of appeals held that the Macario's claims were preempted by federal law. Accordingly, there are no conflicts with decisions by other federal courts of appeal on the issue of

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14. The Federal Aviation Act, 49 U.S.C. § 1421(a), directs the FAA to establish minimum safety standards governing, among other things, the design of aircraft engines, and to certify the types of engines that meet those requirements. The FAA has carried out its mandate by enacting regulations which set forth the process for obtaining safety certifications, the standards that must be met by aircraft and aircraft engines before they can be mass produced, and procedures for testing and design review to ensure regulatory compliance. 14 C.F.R. Parts 21, 22 and 33.

The FAA is authorized to promulgate new standards for existing aircraft and to issue Airworthiness Directives requiring design changes in the interest of safety, if it finds:

(a) an unsafe condition exists in a product; and

(b) that condition is likely to exist or develop in other products of the same type design. 14 C.F.R. § 39.1.

If the FAA finds such unsafe condition, it is authorized, and has the discretion to

> prescribe inspections and the conditions and limitations, if any, under which those products may continue to be operated. 14 C.F.R. § 39.11.

federal preemption, and no important question of federal law to be resolved by this Court.

III. Macario Failed To Appeal The FAA's Order And Cannot Collaterally Attack The Airworthiness Directive.

In essence, Macario is attempting to collaterally attack the FAA's decision.[15] It is well settled that collateral attacks upon administrative orders are impermissible. *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, (1938); *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981); *Whitney National Bank v. Bank of New Orleans and Trust Co.*, 379 U.S. 411, 421-422 (1965); *Gaunce v. deVincentis*, 708 F.2d 1290 (7th Cir.), *cert. denied*, 464 U.S. 978 (1983).

Congress has provided a statutory procedure for review of FAA orders. 49 U.S.C. App. § 1486(a). A party aggrieved by an order of the FAA may file a petition for review in the courts of appeal. *Id.* That procedure is the exclusive remedy for a party dissatisfied with an FAA order. 49 U.S.C. App. § 1486(d). *Green v. Brantley*, 981 F.2d 514 (11th Cir. 1993); *Gaunce v. deVincentis*, 708 F.2d 1290 (7th Cir.), *cert. denied*, 464 U.S. 978 (1983); *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017 (9th Cir. 1980); *Oling v. Airline Pilots Association*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965); *U.S. v. Hayes*, 264 F.2d 1929 (2d Cir. 1959).

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15. Macario contends that the information provided to the FAA was false (Petition, at p. 17), that the FAA ignored comments against the regulation (*Id.*), that the regulatory process was orchestrated by litigation counsel for the respondents (*Id.*), that the Airworthiness Directive should be amended to include P3 filters (Petition, at p. 10), and that the engine fuel control settings for the Beech flight tests were improper (Petition, at p. 5).

Here, Macario failed to exercise his rights under § 1486(a) of the Federal Aviation Act. Certainly, therefore, Macario should not be permitted to attack the FAA's decision collaterally in this proceeding.

IV. The *Noerr-Pennington* Doctrine Was Properly Applied In This Action, And There Is No Uncertainty Regarding Its Application Which Would Justify The Granting Of The Writ.

Macario does not contend that the *Noerr-Pennington* doctrine should be limited solely to antitrust cases. Rather, Macario contends that if the *Noerr-Pennington* doctrine applies in non-antitrust cases, the Court should grant certiorari to affirmatively "answer this question" and to determine the scope of the sham exception. This Court has already done so.

In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court considered the applicability of the *Noerr-Pennington* doctrine outside the context of an antitrust action. There, white merchants who had allegedly been damaged as a result of a civil rights boycott brought actions against the participants in the boycott and the N.A.A.C.P. The Mississippi state court granted injunctive relief and awarded damages. The participants in the boycott appealed. This Court held that boycott activity which was not in and of itself violent was constitutionally protected under the First Amendment because it involved the rights of speech, assembly, association and petition. This Court specifically stated that, "*** it is not disputed that a major purpose of the boycott in this case was to influence government action." 458 U.S. at 914. The Court went on to hold that individuals who participated in the boycott, but who did not participate in violent activity, or did not ratify such violent activity, could not be held liable in damages.

Significantly, too, in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, ____ U.S. ____, 113 S. Ct. 1920 (1993), this Court stated:

> Whether applying *Noerr* as an antitrust doctrine or *invoking it in other contexts* we have repeatedly reaffirmed that evidence of anti-competitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. [Emphasis supplied]

Id. at 1927.

Moreover, the Court, in deciding cases under the *Noerr-Pennington* doctrine, has never held that the First Amendment right to petition the government only applies in antitrust cases. On the other hand, courts of appeals have consistently applied the *Noerr-Pennington* doctrine in non antitrust cases. *See, e.g., Brownsville Golden Age Nursing Home v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (civil conspiracy and tortious interference with business relations); *Gorman Towers, Inc. v. Bogoslavisky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (civil conspiracy).

Contrary to Macario's assertion, there is no need for this Court to grant the Writ to determine the scope of the sham exception to *Noerr-Pennington*. That issue, too, was adequately addressed by the Court in recent decisions. *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, ____U.S. ____, 113 S. Ct. 1920, 1928 (1993); *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

In *Real Estate Investors, supra*, this Court adopted a two-part definition of the sham exception to the *Noerr-Pennington* doctrine. First, a court must determine whether the lawsuit (the challenged activity in the case) was "objectively baseless" in the sense that no reasonable litigant could realistically expect success on the merits. If the challenged activity was objectively baseless, then the court must examine the litigant's subjective motivation. In a footnote, the Court clarified its definition with the following: "A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." 113 S. Ct. at 1928, fn. 4.

This Court has consistently stated that communications that are successful in influencing the government are not a sham. *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 144 (1961) (taking the facts alleged in the complaint as true, defendants' "effort was not only genuine but also highly successful"); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 (1988) ("a successful effort to influence government action . . . certainly cannot be characterized as a sham."). Here, Beech was, in fact, successful in petitioning the FAA, as evidenced by the issuance of the Airworthiness Directive. Accordingly, neither the district court nor the court of appeals could have found that Beech's activity in petitioning the FAA was a sham.

In *Columbia v. Omni International Advertising, Inc.*, 499 U.S. 365 (1991) also cited by Macario (Petition, at p. 17), this Court considered the sham exception to the *Noerr-Pennington* doctrine. There, this Court held that the sham exception to the *Noerr-Pennington* doctrine did not apply to the defendant's successful effort to induce the local government co-defendant to enact an ordinance restricting the size, location and spacing of billboards which severely limited the plaintiff's ability to compete in the market. Specifically, this Court held that *Noerr* protects a party's effort to influence public officials regardless of intent or purpose.

Macario's assertion (Petition, at p. 17) that he produced evidence "from which the jury could infer that the use of the process itself rather than the outcome, which was the liability-producing conduct," is devoid of any factual support in the record.

Macario's broad, superficial and conclusory statement that he "established" that Beech provided false information to the FAA (Petition, at p. 17) is not sufficient to overcome Beech's First Amendment rights.[16]

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16. In *Noerr*, *supra*, this Court held that even though the defendants, and to some degree the plaintiffs themselves, in their

Moreover, the FAA carefully considered the numerous submissions by Macario's counsel and his experts and determined that the Airworthiness Directive should be issued. Macario never challenged the FAA's decision. Purely and simply, the FAA's favorable response to Beech's expressions of concern establishes as a matter of law that Beech's concerns were bona fide and not a sham. Macario seeks to impose liability on Beech because Beech expressed flight safety concerns to the FAA, which the FAA has determined to be valid. A clearer attempt to limit a party's constitutional right to "petition the government" is difficult to imagine.

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advertising campaigns had "deliberately deceived the public and public officials . . . that deception, reprehensible as it is, can be of no consequence as far as the Sherman Act is concerned." 365 U.S. at 145.

CONCLUSION

The essence of Macario's complaint is that he has not been able to force PWC to reissue original SB 1330. The FAA is the agency charged by Congress with deciding what modifications may safely be made to existing airplanes and given primary jurisdiction over such issues. The FAA has found that the installation of P3 filters creates a substantial flight safety risk and determined that SB 1330 should not be issued. Macario never appealed the FAA's decision and cannot attack it here. The district court and the court of appeals have already decided that Macario is not entitled to any relief. This case does not present any significant question of federal law and does not deserve the attention of this Court.

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

RULES AND REGULATIONS

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

(Docket No. 91-ANE-06;
Amendment 39-8305, AD 92-15-11)

Airworthiness Directives: PRATT & WHITNEY
Canada PT6A Series
Turboprop Engines

Friday, July 17, 1992

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Pratt & Whitney Canada (PWC) PT6A series turboprop engines, that requires removal of the compressor delivery air line (P3) filter assembly. This amendment is prompted by aircraft flight test results that have revealed an engine configuration and a set of operating conditions where engine acceleration is insufficient to provide for required aircraft balked landing performance. The actions specified by this AD are intended to prevent excessive engine acceleration time that could result in an aircraft's inability to safety perform the required balked landing maneuver.

EFFECTIVE DATE: August 17, 1992.

ADDRESSES: The service information referenced in this AD may be obtained from Pratt & Whitney Canada, Technical Publications Department, 1000 Marie Victorin, Longueuil, Quebec J4G 1A1. This information may be examined at the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, room 311, 12 New England Executive Park, Burlington, Massachusetts.

FOR FURTHER INFORMATION CONTACT: Robert E. Guyotte, Manager, Engine Certification Branch, ANE-142, Engine and Propeller Directorate, Aircraft Certification Service, FAA, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803-5299; telephone (617) 273-7080; fax (617) 270-2412.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an airworthiness directive (AD) that is applicable to certain Pratt & Whitney Canada (PWC) PT6A series turboprop engines was published in the Federal Register on March 1, 1991 (56 FR 8733). That action proposed to require inspection for and removal of the compressor delivery air line (P3) filter assembly.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments contained in 23 comment letters received. All of the comments received are addressed in the following paragraphs.

Three comments reference the content of the Notice of proposed rulemaking (NPRM). One commenter states that too little technical information was provided to evaluate the merit of the proposed AD. The FAA disagrees. The detail of technical content in the Notice of proposed rulemaking (NPRM) is in accordance with prescribed FAA practices. Several comments contain detailed technical discussions relative to information contained in the NPRM. Therefore the FAA believes the NPRM adequately described the proposed action.

Two commenters state that the comment period was too short, and object to the FAA's denial of a request for an extension. The FAA disagrees. The NPRM 45 day comment period is in accordance with established FAA practices. Also, none of the comments provided justification to support the request. A number of comments

were received after the comment period closing, and were considered in the decision making process.

One comenter also states that the NPRM was inadequately advertised. The FAA disagrees. Publication in the Federal Register is the official method by which proposed AD's are made known to the public.

Several comments address the service history of affected PWC PT6A engines, and question whether the data demonstrates a need for installation of P3 filters to prevent fuel control unit (FCU) pneumatic contamination. The FAA has reviewed available sources of information, and can find no pattern of engine failures or power losses in service due to FCU pneumatic contamination. In addition, Transport Canada, the responsible airworthiness authority, has reviewed their own service difficulty data base, and that of PWC, and cannot identify a service problem pattern relating to FCU pneumatic contamination. Lastly, the FAA has no information relative to any National Transportation Safety Board (NTSB) probable cause findings related to engine failures or power losses associated with FCU pneumatic contamination. The P3 filter option offered by PWC is intended for operations in harsh environments as a method for extending useful FCU installed life. However, FCU failure modes and effects due to pneumatic contamination are identical with or without P3 filter installation. One commenter describes one such harsh environment, noting FCU problems when operating in an area where pollutant particles from paper processing mills were discharged into the atmosphere. While the FAA concurs that a P3 filter could be useful when operating in such an environment, another commenter points out that service difficulty reports describe slow or no accelerations with clogged P3 filters.

Two commenters state that certain tests have shown a definitive need to install P3 filters. The FAA has no information of any of these tests, and none were submitted. As discussed above, existing service difficulty data

does not support the conclusions stated in the comments. One commenter states that a "roll-back" or power loss event can result in a high propeller drag condition, leading to an accident. The FAA disagrees. An engine power loss due to FCU pneumatic contamination is no more severe than any single engine power loss for any other reason. The affected airplanes are all twin-engine airplanes, and must meet all applicable Civil Aviation Regulations (CAR) or Federal Aviation Regulations (FAR) requirements for single engine operation.

Two comments address the U.S. Navy's use of Beech Aircraft Company (BAC) T-34C (PWC PT6A powered) airplanes. The two comments state that the Navy had engine power loss problems related solely to the lack of P3 filters in BAC T-34C airplanes, and therefore P3 filters must be necessary. The FAA disagrees. The FAA does not have direct access to the Navy's service difficulty database, however, the FAA has identified nine BAC and PWC field service documents that pertain to a BAC T-34C power loss problem. Of this group, one action to address this problem was to install a P3 filter. Further research has shown that the most dramatic improvement to the BAC T-34C engine power loss problem was made by adjusting the torque controller setting, not installation of a P3 filter. The incorporation of these nine service documents, together, coincides with the apparent reduction in the BAC T-34C engine power loss problems.

Also, it is significant that the BAC T-34C idle is 62% to 65% core speed (Mg), while the idle of the affected airplanes is only in the 51% Ng range. Therefore, no engine acceleration problems associated with P3 filter installation would be expected on these higher idle installations. Lastly, there is little comparison of mission or operating environment between a single engine military trainer (T-34C), and a twin engine business type airplane. Therefore, the FAA has determined that the noted BAC T-34C service history is not relevant to this issue.

One commenter states that PWC issuance of a service bulletin offering the P3 filter as an option is sufficient evidence of the necessity of installing the filter. The FAA disagrees. As discussed previously, the FAA has determined that the service history data base does not indicate the need to require P3 filter installation. Also, PWC's publication of an optional service bulletin does not mean that operation of a PT6A engine without a P3 filter is unsafe.

Two comments address the airplane applicability of this AD. The comments question why other airplane types powered by affected PWC PT6A engines were not included in the AD action. The FAA agrees that other model airplanes are potentially affected, and has reviewed with appropriate airplane manufacturers the possible effects of P3 filter installation. At this time, the FAA has identified one additional model series (Cessna 406) that is directly affected. Flight tests similar to the final phase BAC tests have been completed on this model, yielding similar results of slow engine acceleration, and concurrent airplane handling difficulty during balked landing maneuvers. Corrective action for this model series airplane is being evaluated and additional rulemaking may follow.

Several comments address the controlling test parameters used during the final phase of the Beech test program, specifically idle Ng values and generator load factor. In particular, several comments question the use of 51% idle Ng inflight as not being an approved value. The FAA disagrees. The FAA has reviewed BAC and PWC service documents (i.e., the Airplane Flight Manual (AFM) and Engine Installation Manual), and has determined that a ground or inflight idle Ng of 51% is approved in accordance with both manufacturers' limitations. Comments also state that the BAC King Air Model C90 AFM, Limitations Section, prohibits the use of generator load factor greater than 50% with an idle Ng below 57%. The FAA disagrees. The FAA has

reviewed the AFM, and has determined that the Emergency Procedures Section instructions can allow, under certain circumstances, a maximum generator load factor while the engine is operated at low idle (51% Ng) during approach and landing. It has also been determined that the Ng/generator load limits address a generator cooling requirement as opposed to an engine operating concern, and that such a limit is actually not required on C90 aircraft. Also, the use of maximum generator load at 51% Ng is allowed by PWC limitations. Also, several comments state that the BAC fuel control adjustments were improper, exceeded approved limits, and were inappropriate for field service. The FAA disagrees. The FAA has reviewed the final phase BAC test FCU calibrations, and compared them to approved type design limits. All values (i.e., Ng, acceleration fuel flow, etc.) have been found to be within approved type data limits. As to the appropriateness of the calibrations, the FAA believes that test calibrations represent a worst case approved configuration relative to engine acceleration. The fact that the FCU calibrations are not typical of in-service units does not affect the appropriateness of the worst case test configuration.

One commenter states that the BAC C90 AFM Limits Section "Minimum Ng vs. Generator Load" table is not related to starter-generator cooling requirements, but more closely related to engine operational considerations. The FAA disagrees. The noted limit table has been confirmed by BAC to be related to hot day (125 degrees F) starter-generator cooling. Increased engine speeds increase the cooling air flow in order to keep the starter-generator within its component temperature limit. It must also be noted that the final phase BAC C90 tests were conducted within the horsepower and bleed extraction limits noted in the applicable PWC PT6A Installation Manual.

Several comments address inflight idle Ng, and whether a particular Ng value on the ground can be maintained during the subject flight conditions, and

whether this value can change from flight-to-flight. The FAA has reviewed the PWC PT6A control system design, and has determined that the idle Ng value on the ground will be maintained −1% inflight, up to the altitude (barometric pressure) where decreasing idle fuel flow equals the FCU mechanical stop minimum fuel flow. This is due to the FCU scheduling to maintain a specific Ng value within the range of its authority over low end fuel flow. Above that altitude, the previously constant (−1%) idle Ng becomes a variable, increasing with altitude. It is possible to reduce this idle Ng value with horsepower or bleed extraction, if the demand is beyond the range of FCU authority. In support of this review, the FAA has conducted several independent flight tests that verified the expected idle Ng profile with altitude. The FAA flight tests also verified that there were no significant flight-to-flight variations in the idle Ng values. It should also be noted that during the final phase BAC tests, idle Ng was never artificially adjusted to a lower value, either on the ground or inflight. One commenter also suggests that a typical in-service airplane (nominal FCU calibration) would be more representative for engine acceleration testing. The FAA disagrees, and believes the configuration tested in the last phase of the Beech program is a proper worst case configuration relative to approved type design data.

Four commenters state that the BAC test results were erroneous and invalid due to not meeting type design requirements. The FAA disagrees. The FAA has closely reviewed the airplane configuration tested in the final phase of BAC testing, and closely reviewed the demonstrated test conditions. The FAA has determined that the airplane configuration and test parameters meet type design data. The test configuration and test parameters represent a worst case relative to engine acceleration performance, and airplane balked landing performance.

Several comments address the final phase of BAC tests, specifically the flight test on August 17, 1990. One

commenter states that the FAA observer log of engine acceleration time data did not agree with the BAC log. The FAA disagrees. The FAA has reviewed the logs for the last flight test on August 17, 1990, and finds that the two logs contain equivalent data. Also, the commenter identifies the August 17, 1990, test as BAC Flight No. 18, which is incorrect. The August 17, 1990, test is identified as BAC Flight No. 19. The BAC test report contains log sheets for both tests. BAC Flight No. 18 was flown on August 16, 1990. The noted test points were timed engine accelerations. BAC Flight No. 19 on August 17, 1990, also included several touch-and-go landings, which evaluated airplane handling. Another commenter states that there is a discrepancy in the target Ng engine speeds between various Flight No. 19 test conditions. In particular, the commenter questions the variation in Ng values encountered in a series of touch-and-go landings, and those reported by BAC during Conditions 3 and 4, which were conducted in stabilized level flight conditions. The FAA has reviewed the test procedures and test results related to this comment. Flight No. 19 Conditions 3 and 4 allowed Ng to stabilize at the idle value of 51% Ng. The touch-and-go tests were conducted as a variation to the BAC Configuration 6 test procedures. Configuration 6 required a go-around procedure, initiated from 50 feet above the runway. Initial tests showed this to be an unacceptably dangerous procedure. Consequently, the FAA concurred with the BAC recommendation to alter the procedure to a touch-and-go test. For these tests, the airplane was landed in a normal manner with the condition levers at the low idle positions. After touchdown, the power control levers were moved to the idle positions, the flaps were retracted and the airplane retrimmed for takeoff. At that time, both power control levers were rapidly advanced to full power positions. The test site runway length precluded permitting the engines to decelerate fully to the idle 51% Ng speeds. Three tests were conducted, and the minimum recorded Ng values were 60%, 57%, and 54%,

during the engine deceleration on the ground, and prior to throttle burst to full power and takeoff. The Condition 3 and 4 tests were conducted in an entirely different manner and for the purpose of collecting entirely different data than the modified Configuration 6 tests. Another commenter states that the final phase BAC tests were conducted without known FCU calibrations. The FAA disagrees. The FCU calibrations for the final phase BAC tests were forwarded to the FAA. The FAA has reviewed the FCU calibration reports and has determined that the FCU's were calibrated prior to the final phase BAC tests and that the FCU calibrations were within approved limits.

Another commenter states that BAC Flight No. 19 was invalid due to only one engine having a P3 filter installed. The FAA disagrees. There are no airplane or engine manual restrictions requiring that both engines be configurated the same relative to P3 filter installation. Since individual engine change-outs do occur on BAC models affected by this AD, it is reasonable to expect that some airplanes may be configured with only one engine having a P3 filter installed. The FAA is aware of at least one airplane affected by this AD that had incorporated the PWC P3 filter on only one engine. The commenter also states that no baseline testing exists for either engine, and surmises that the long acceleration times for the P3 filter equipped engine could only be due to an engine problem. The FAA disagrees. BAC Flight No. 19 was conducted using the same airplane and engines as was used for all of the BAC final phase tests. Therefore, baseline test data with and without P3 filters exists for both engines. Engine operation during BAC Flight No. 19 was very similar to the previous test flights, with the P3 filter configured engine demonstrating increased acceleration time consistent with those encountered in the previous tests. The engine not equipped with a P3 filter also performed very similarly to

previous baseline flight tests. No unusual engine anomalies were noted during BAC Flight No. 19, other than the effect of having a P3 filter installed.

Several comments address the effect of a P3 filter on engine acceleration. Five commenters state that the installation of a P3 filter has no effect on engine acceleration. One commenter also states that generator load and ambient temperature are the only significant factors in the BAC engine acceleration tests. One commenter states that P3 filter installation can have a negative effect on engine acceleration, as shown by the final phase BAC tests. The FAA has determined by test that under certain combinations of ambient temperature, bleed air, horsepower extraction, and power setting, engine acceleration time can be negatively affected by P3 filter installation. One commenter suggests that the FAA should not rely on engine acceleration times alone in evaluating the effect of P3 filter installation. The FAA agrees. The primary criteria for acceptable engine acceleration is airplane handling during a balked landing maneuver, not a timed engine acceleration. One commenter states that Piper Aircraft Corporation (PAC) airplanes equipped with P3 filters have not experienced engine acceleration service problems as identified by the BAC tests. The FAA disagrees. The FAA does have records of PAC PWC PT6A powered airplanes that have had acceleration problems due to clogged P3 filters. However, there are no service problems on record indicating engine acceleration problems due to clean (unclogged) installed P3 filters.

Two commenters state that the P3 filter is effective in collecting pneumatic contamination. The FAA agrees that the P3 filter does perform its intended function of collecting pneumatic particle contaminants. One commenter also states that a clogged filter will manifest itself with slow accelerations or no-starts. The FAA agrees. The FAA is aware of engine no-starts, minimum-flow on start-up, slow accelerations and no accelerations with

concurrent high inter-turbine temperature, and roll-backs to minimum-flow occurring due to clogged P3 filters. However, as stated earlier, there are no service difficulty records indicating a safety problem for PWC PT6A engines not equipped with P3 filters. The FAA has reviewed available sources of information, and can find no pattern of engine failures or power losses in service due to FCU pneumatic contamination for PWC PT6A engines not equipped with P3 filters. Lastly, the PWC PT6A FCU failure modes and effects due to pneumatic contamination are identical with or without a P3 filter.

One commenter states that additional BAC tests (Model A100) showed a left to right engine acceleration time difference of 2 seconds, with or without P3 filters installed, and questions why a 2 second difference is acceptable for A100 models. The FAA evaluation criteria for both tests was airplane handling performance during balked landing maneuvers, and not left to right engine acceleration time differentials. The supplemental BAC A100 tests were designed to fully evaluate airplane balked landing performance on a high minimum idle configuration (63% Ng range), with and without P3 filters installed. The FAA has determined that the effect of P3 filter installation on these installations is significantly less than on lower idle installations (51% Ng range), and that A100 handling during the balked landing maneuvers was acceptable. During the supplemental A100 tests, the maximum engine acceleration time increase due to P3 filter installation was 1.98 seconds, while the left to right engine acceleration time differential increased 0.84 seconds. During the final phase BAC Model C90 tests, which are the basis for this AD, the maximum engine acceleration time increase due to P3 filter installation was 25.04 seconds, while the maximum left to right engine acceleration time differential increased 14.99 seconds. The FAA evaluation criteria for both tests was airplane handling performance

during balked landing maneuvers, as affected by increased engine acceleration time due to P3 filter installation. The FAA did not evaluate either airplane by a timed engine acceleration alone, nor solely by left to right engine acceleration time differentials.

One commenter questions why results from the initial phase of the BAC tests were not also considered in the AD action. They were not considered because the initial phase of BAC tests were conducted without benefit of a type design P3 system configuration and known FCU calibration. Post-test inspection found the P3 system to be not in conformity with approved type design, and the FCU calibration to be in error. No definitive results were obtained from these tests for the above reason. This AD action is based on the final phase BAC tests that incorporated a worst case approved engine configuration relative to engine acceleration. All BAC final phase tests were fully coordinated with the FAA, and the FAA was invited to participate in all tests.

Several comments discuss the possibility of exploring methods by which a P3 filter may remain as a installed option. In particular, the commenters suggest either a redesign of the filter, or modification of certain engine operating limits so as to yield acceptable engine/airplane performance. As discussed earlier, no safety issues have been identified that would require that an AD be issued to require P3 filter installation, therefore the FAA cannot mandate that the manufacturers change either the filter design or associated operating limits. However, the AD process does provide a method by which an alternate means of compliance to AD requirements can be approved by the FAA. This method is available to any affected person. One comment suggests that an installed engine acceleration check would be sufficient to establish acceptable airplane performance. The FAA disagrees. FAA type design requirements are such that acceptable engine/airplane performance is required for the worse case certified

configuration. Also, allowing an individual installed engine acceleration check does not account for engine or FCU deterioration or change out. One commenter states that BAC did not investigate engine acceleration performance at the maximum certified minimum idle value of 53% Ng. The comment is accurate. However, the tested configuration of the final phase BAC tests represents the worst case relative to engine acceleration. The BAC final phase tests were not intended to develop alternatives, but to investigate a potentially unsafe condition. One commenter questions what consideration has been given to the original intent to the PWC P3 filter option. The FAA has considered the original intent of the P3 filter option. The P3 filter is a method of dealing with atmospheric contamination, which can cause wear within the FCU. The P3 filter can, under certain conditions, reduce the expense of maintaining the FCU in an airworthy condition. It must also be noted that engine failure modes and operational effects are identical with or without a P3 filter installed. Also, as previously discussed, no safety issues have been identified which would require that P3 filters be mandated. However, relative to the original intent of the PWC P3 filter option, the FAA has coordinated with PWC to define a test program that may identify an engine configuration allowing P3 filters to remain as an option. This AD will be amended to include a P3 filter installation option if it is developed.

One commenter states that use of the engine inlet inertial separator can have a significant affect on engine acceleration characteristics. The FAA disagrees. The inertial separator is a device which promotes the bypass of airborne debris (ice, rain, hail, etc.) away from the engine inlet. The inertial separator does not significantly affect engine inlet airflow parameters. The type design approval by Transport Canada requires that PWC PT6A engines demonstrate fully acceptable operating characteristics with and without the inertial separator extended. Design requirements for the airframe portion of

the engine inlet system are found in the applicable Installation Manual. The final phase BAC tests were conducted with the inerital separator retracted. The FAA does not concur that use of the inertial separator has a significant effect on engine acceleration characteristics.

One commenter questions whether the FAA has considered the increased maintenance cost associated with P3 filter removal. The FAA has determined that the fleet potential for increased FCU maintenance cost is believed to be minimal, primarily due to the low rate of installation of P3 filters in service, which is estimated to be less than 5% of the fleet.

One commenter states that if the BAC tests are valid, then the airplane is improperly certificated if it is unable to perform the balked landing maneuver, and should be grounded by emergency AD. The FAA disagrees. The FAA has determined that the affected aircraft were probably certificated with the P3 filter available as an engine option. The BAC tests are valid in that they establish that an unsafe condition under special operating conditions has developed due to the installation of the P3 filter. To date the only actual service problems identified with P3 filters on PWC PT6A engines are no-starts, minimum-flow on start-up, slow accelerations and no accelerations with concurrent high interturbine temperature, and rollbacks to minimum flow, all due to clogged P3 filters. Therefore, the FAA has determined that the proposed action is appropriate.

Two comments address pending class action litigation concerning P3 filter installation on certain PWC PT6A powered airplanes. The commenters suggest that the FAA should consider this pending civil action relative to this AD. The FAA is taking this action in response to the findings of an unsafe conditions. Further action may be taken if circumstances warrant.

After careful review of the available data, including the comments noted above, the FAA has determined

that air safety and the public interest require the adoption of the rule as proposed, with the following change to the economic evaluation.

The FAA estimates that there are approximately 4,330 PWC PT6A series engines installed on aircraft of U.S. registry, and that approximately 225 engines have a P3 filter installed. The FAA estimates that for those 225 engines with a P3 filter installed it will take approximately 4 work hours to remove the filter at $55 per work hour. The FAA estimates also that there will be no part cost associated with this AD. Based on these figures, it is estimated that the total cost impact of this AD will be $49,500. Pratt & Whitney Canada has advised the FAA that they may assume any parts and labor costs to remove the subject filter assemblies from affected engines. Consequently, there should be minimal cost impact on U.S. operators for parts or labor.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

92-15-11 Pratt & Whitney Canada: Amendment 39-8305; Docket No. 91-ANE-06.

Applicability: Pratt & Whitney Canada (PWC) PT6A-6, PT6A-6/C20, PT6A-20, PT6A-20A, PT6A-21, PT6A-27, PT6A-28, PT6A-34, PT6A-348 and PT6A-36 turboprop engines installed on Beech Aircraft Corporation Models 65-A90, 65-A90, 65-A90-1, 65-A90-2, 65-A90-3, 65-90-A4, 99, 100, 99A, B90, C90, C90A, E90, H90, A99, A99A, B99, and C99 aircraft.

Compliance: Required within the next 180 days after the effective date of this AD, unless accomplished previously.

To prevent excessive engine acceleration time that could result in an aircraft's inability to safely perform the balked landing maneuver required by Federal Aviation Regulations (FAR) part 23, paragraphs 23.75(d), 23.77 and 23.143(a)(5), accomplish the following:

(a) Perform a visual inspection to determine if a compressor delivery air line (P3) filter assembly has been installed on the engine.

Note: The compressor delivery air line assembly may have been installed on the engine as original equipment, or may have been installed per any of the following PWC Service Bulletins: 1205, 1253, 1290, 1294, 1330, 1343, or 1378.

(b) Remove from service, if installed, the P3 filter assembly.

Note: The engine compressor delivery air line assembly can be returned to an approved configuration without a P3 filter. For information, refer to the applicable PWC Maintenance Manual and Parts Catalog.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office, FAA, Engine and Propeller Directorate. The request should be forwarded through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Engine Certification Office.

Note; Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained for the Engine Certification Office.

(d) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(e) This amendment becomes effective on August 17, 1992. Issued in Burlington, Massachusetts, on June 29, 1992.

Jay J. Pardee,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

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